84-1834 ①

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ALEXANDER L. STEVAS
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No. 84

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

WINFORD KENT BISHOP, Petitioner,

versus

INTERNATIONAL PAPER COMPANY,
JEFFREY M. SMITH,
CHARLES MYNEDER, and
BEN R. SWANK, JR., Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT AND THE COURT OF APPEALS OF GEORGIA

PETITION

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I.

QUESTIONS PRESENTED FOR REVIEW

1. (a) Where 33 states by statute, [1] by rule of court, [2] or by both [3] permit appellate courts to assess a monetary penalty against an appellant or counsel for frivolous appeal, (b) where four states by statute, [4] by rule of court, [5] or by appellate decision [6] require the courts to give written notice prior to imposition of penalty, (c) where this Court directs a petitioner to respond to a Rule 49.2 motion within 30 days, [7] Is an appellant or a petitioner, or his attorney, entitled under the Due Process Clause of the Fourteenth Amendment to predeprivation notice and hearing (by briefs only) prior to the highest or intermediate state court's summary and discretionary determination, on its own motion, (a) whether an appeal is one "which the court determines to be frivolous," (b) whether it will impose a penalty for frivolous appeal in that court or in a lower state court, (c) how much of a penalty it will impose where the maximum is $500?

2. (a) Where by official judicial act and relying on a newly promulgated court rule at variance with 139 year old state statute (predecessor to OCGA §5-6-6), an intermediate state court on its own motion and retroactively im-

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[1] Fla. Stat. Ann. §57.105 (West 1985 Supp.); Idaho Code §12-121 (1979); Kan. Stat. Ann. §60.2007 (1983); Maine Rev. Stat. Ann. Tit.14 §1802 (1978); Miss.Code Ann. §11-3-23; N.H. Rev. Stat. Ann. §490:14-2 (1983); N.M. Stat. Ann. §39-3-27; Tenn. Code Ann. §27-1-122; Utah Code Ann. §78-27-56 (1983 Supp.).

[2] Ala. Code S.Ct. Rule 38; Cal. Civ. & Crim. Code Rule 26 (West 1981); Ariz. Rules of Ct., Civ. App. Pro. Rule 25; Colo. Rev. Stat. App. Rule 38(d) (1983 Supp.); Del. Code Ann. Vol. 16 Rule 25; Ind. Code Ann. App. Rule 15(6) (Burns 1984); Iowa Rules of Ct., App. Pro. Rule 23, 28; Ky. Rev. Stat. S.Ct. Rule 3.450;La. Rule of Ct., Cts. of App. Rule 2-19; Md. Gen. Prov. Code Ann. Rule 1-341 (1985); Minn. Rules of Ct., Civ. App. Pro. Rule 15.05; Mo Ann. Rules §84-19 (Vernon's); Nev. Rev. Stat. App. Pro. Rule 38; Ohio Ct. Rules App. Pro. Rule 23; Okla. Ct. Rules, S.Ct. Rule 15.1; Or. Rev. Stat. §20.097 (1983); Pa. Rules of Ct., App. Pro. Rule 2744; Tex. Rules of Ct., App. Pro. Rule 438, Gen. Rule 13; Wash. Rules of Ct., App. Pro. Rule 18.9; Wis. Rules of Ct., App. Pro.

poses a $500 penalty on an appellant for frivolous appeal who then expends substantial money, time and effort in preparing and filing a brief demonstrating that the application of said rule violates his right to due process of law under the Fourteenth Amendment; (b) where said court then vacates the opinion and enters another which deletes the penalty but gratuitously condemns the appeal of petitioner who is an attorney and states that said opinion is intended as notice of the rule and its violation for the guidance of the State Bar; (c) where in order to satisfy the jurisdictional requirements of the United States Supreme Court the aggrieved party must petition the highest state court in which review may be had (28 U.S.C. §1257[3], *Banks v. California,* 395 U.S. 708, 23 L.E.2d 653 [1969]) in order ultimately to seek review in this Court for redress of his grievances; (d) where the certiorari petition to the highest state court raises the issue that initial application of said rule followed by official condemnation by the intermediate state court deprived him of Fourteenth Amendment due process, and equal protection; and (e) where respondents move for a penalty "for filing this frivolous petition for certiorari" which in turn is followed by the highest state court's denial of certiorari and imposition of a $200 penalty for "frivolous appeal" on petitioner. Does the highest state court's $200 penalty on petitioner constitute an impermissible burden on his Right of Access to the Supreme Court to

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Rule 809.25; Wyo. Rules of App. Prol, Rule 10.05. N.C. Rule 34

[3] Ga. Code Ann. §24-4514, §24-3626(b) and OCGa.Ann. §5-6-6; Mass. Gen. Laws Ann., ch. 211 §10 (West 1958) and Mass. Gen. Laws Ann. App. Pro. Rule 25 (West 1978).

[4] Kan. Stat. Ann §60-2007 (1983).

[5] Fla. Stat. Ann. App. Rule 9.410.

[6] *Marriage of Flaherty,* 646 P.2d 179, 183 Cal. Rptr. 508, 31 C.3d 637 (1982); *Blanton v. Equitable Bank, N.A.*, 485 A.2d 698 (Md. App. 1985). But cf. *Evans v. Arthur*, 678 P.2d 943 (Ariz. 1984); *Broyles v. Estate of Brown*, 295 Ore. 795, 671 P.2d 94 (1983).

[7] See *Tatum v. Regents, Univ. of Nebraska-Lincoln,* 75 L.E.2d 804 (petitioner directed to respond to respondent's motion (under Rule 49.2) in 30 days) (1983); with *Ibid.*, 77 L.E.2d 1346 (1983) (petitioner ordered to pay $500 damages to respondent).

raise colorable violations of the United States Constitution as assured by the First Amendment and the Fourteenth Amendment? Does the highest state court's procedure constitute a reversal of the intermediate state court for abuse of discretion and therefore deny petitioner's Right of Access to his own highest state court?

3. (a) Where the highest state court denies a writ of certiorari but adjudges that a petitioner must pay a $200 penalty for having taken a frivolous appeal to an intermediate state court (then concluded); (b) where petitioner is an attorney who by professional disciplinary standards is obliged to pay an adverse final judgment within ten days after rendition;[8] (c) where said penalty is payable to the highest state court[9] (but the remittitur is stayed upon petitioner's request); Does the highest state court have a direct pecuniary interest in the court's own motion to assess a penalty for frivolous appeal under *Tumey v. Ohio,* 273 U.S. 510, 71 L.Ed 749 (1927), and Does this interest disqualify the court from asserting and then adjudging its own motion for a litigant to pay a $200 penalty to itself under the Fourteenth Amendment Due Process Clause?

4. (a) Where a party aggrieved by a non-money judgment of a state trial court has a right under state law to file an appeal and pursuant thereto files a notice of appeal and incurs substantial costs for a record on appeal which is docketed in the intermediate state court at a time prior to identical effective dates of virtually identical rules promulgated by the highest and intermediate state courts permitting them to impose up to a $500 penalty for frivolous appeal from civil non-money judgments; (b) where the appellant to the intermediate state court testifies by affidavit at his first opportunity (after imposition, there, of a $500 penalty) that he would not have taken the appeal or prosecuted same had he known of the adoption of the rules; (c) where

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[8] Cf. Standard 64.

[9] Cf. *Bishop v. International Paper Co.,* 253 Ga. 709, 710, 327 S.E.2d 226(1985), with *Hodges v. Hodges,* 235 Ga. 848 (3), 221 S.E.2d 597 (1976).

both courts had previously held in respect of a 139 year old state statute that they had no jurisdiction to award damages to an appellee in an appeal from a non-money judgment taken for delay only (predecessor to OCGA §5-6-6); and (d) where there is no evidence that either court is burdened by frivolous appeals from non-money judgments (or any kind of judgment); Is the application of said court rules in a case in which there is no money judgment so abrupt, unexpected and prejudicial to petitioner that same is an impermissible retroactive application of substantive state law in violation of the Due Process Clause of the Fourteenth Amendment?

5. (a) Where for more than 100 years the highest state court has recognized that a contract or conveyance can create a valid trust in which the trustee (with initial important active duties) and the beneficiary are the same individual (*Featherston v. Richardson,* 68 Ga. 501 [1882]); (b) where petitioner receives $100,000 as trustee under trust provisions in a settlement agreement; (c) where respondents commit an egregious smear on petitioner before the trust is executed prompting him to rely on established precedent that until the consideration for the settlement agreement is received by him (as a beneficiary and not as trustee), the agreement is an executory accord, not a binding contract, that he can repudiate the executory settlement and sue for the full amount due him (*Taylor v. Central of Ga. Ry. Co.,* 99 Ga. App. 224, 108 S.E.2d 103 [1959]); Is the refusal by the intermediate and highest state courts to apply said precedent so abrupt, unexpected and prejudicial to petitioner that same is a retroactive application of substantive state law in violation of his right to Due Process of Law under the Fourteenth Amendment?

6. (a) Where the highest and intermediate state courts promulgate rules which permit them, at their discretion, to impose a penalty up to $500 on a civil appeal "which the court determines to be frivolous"; (b) where said rules do not apply by their terms to frivolous criminal appeals; and (c) where in an unrelated decision entered within thirty

days of the highest state court's imposition of a $200 penalty against petitioner, the court required the filing of frivolous criminal appeals (*Huguley v. Georgia*, 253 Ga. 709, 324 S.E.2d 729 [1985]); Does application of said rules to petitioner deny his right to Equal Protection of the Laws under the Fourteenth Amendment?

7. (a) Where rules promulgated by the highest and intermediate state courts grant to them summary discretion to impose a penalty in an appeal "which the court determines to be frivolous"; (b) where the rule of the highest state court explicitly limits the party who may be penalized to "the appellant," not "the petitioner"; and (c) where a penalized "petitioner" who is admitted to the courts of said state testifies by affidavit at his first opportunity (after imposition, there, of a $200 penalty) that he studied the language of the rule and concluded that it clearly and unambiguously did not apply to him; Are the court rules impermissibly vague under the Fourteenth Amendment Due Process Clause?

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IV. REFERENCES TO OPINIONS AND ORDERS IN COURTS BELOW.

The opinion of the Court of Appeals of Georgia, dated November 14, 1984, is unreported. It is set forth in the Appendix at A-8. Parts 1 and 2 of said opinion are identical to and were reported as Parts 1 and 2 of the opinion of the Court of Appeals, dated December 10, 1984. The latter opinion is reported at 173 Ga. App. 37, 325 S.E.2d 870 (1984). It is set forth in the Appendix at A-1. The slip order and formal order of December 10, 1984, vacating the November 14, 1984, opinion and substituting the December 10, 1984, opinion are unreported and are set forth in the Appendix at A-6.

The order of the Supreme Court of Georgia denying the petition for a writ of certiorari and imposing a $200 penalty is reported at 253 Ga. 739, 327 S.E.2d 226 (1985) and is set forth in the Appendix at A-7.

The order of the Court of Appeals correcting the record in the Court of Appeals, dated January 29, 1985, is unreported and set forth in the Appendix at A-14.

The orders of the Supreme Court of Georgia denying the motion for reconsideration and respondents' motion for sanctions "for filing this frivolous motion for reconsideration," both dated February 21, 1985, are unreported and set forth in the Appendix at A-7 and A-12.

The direction of the Supreme Court of Georgia pertaining to stay of the remittitur, dated February 21, 1985, is unreported and set forth in the Appendix at A-13.

V. GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

(i) The dates of the judgments or decrees sought to be reviewed are December 10, 1984 (Court of Appeals of Georgia) and January 25, 1985 (Supreme Court of Georgia). The times of their entry are the same as the dates of the judgments.

(ii) The date of an order respecting a rehearing is February 19, 1985. Ninety days expires May 20, 1985.

(iii) The statutory provision believed to confer on this Court jurisdiction to review the judgments or decrees in question by writ of certiorari is 28 U.S.C. §1257 (3). Appeal is also available under 28 U.S.C. §1257 (2).

VI. CONSTITUTIONAL PROVISIONS, STATUTES, RULES WHICH THE CASE INVOLVES.

Said sources are set forth in the Appendix beginning at page A-100. They are lengthy, and citation alone will be made at this point.

VII. STATEMENT OF THE CASE.

A. Statement of Facts.

1. Petitioner's Previous Legal Services for International.

Petitioner is an attorney and represented International Paper Company ("International") jointly with respondents Swank and Myneder for some six years, culminating in the *Matter of Georgia Paneling Supply, Inc.*, cited in the Table of Authorities.

Petitions for writ of certiorari were denied sub nom. *Quinault Pacific Corp. v. Aetna Business Credit, Inc.*, 449 U.S. 954, 66 L.E.2d 218, 101 S.Ct. 360 (1980), *rehearing denied*, 449 U.S. 1104, 66 L.E.2d 832, 101 S.Ct. 905 (1981).

International Paper Company was involved in a related certiorari petition styled *Quinault Pacific Corp. v. Barclays American/Business Credit, Inc.*, denied at 104 U.S. 708, 79 L.E.2d 172, –0– S.Ct. –0– (1984).

2. Dispute Between Lawyer and Client.

During a subsequent trial in another but related case, International and its adversaries reached a settlement in October, 1981.

But International would not pay petitioner the $171,000 the parties had agreed would be due upon settlement. Ultimately, International terminated petitioner as counsel and retained respondent Smith to avoid paying any attorney's fee to petitioner.

Petitioner attempted personal persuasion, appealed to International's executives, sought arbitration by the State Bar of Georgia (which International first agreed to; and then reneged on) and a cooling off period, without success. Nearly a year after the settlement, International sought a declaratory judgment in federal court that it owed no monies to petitioner. Before service of process was effected on petitioner, he sued respondents in the Superior Court of Fulton County, Georgia.

3. Execution of Executory Accord.

Shortly thereafter, respondents drafted a "Settlement Agreement and General Release" ("the accord") (set forth in the Appendix at A-00), executed it and had signatures acknowledged before notaries public in late October, 1982, and early November, 1982, and sent same to appellant on November 10, 1982. The accord barred all claims "prior to execution, but mentioned two executions–respondent[3] *and* petitioner's, which in fact occurred at different times." It required petitioner to put $100,000 *in trust*, to pay all the expenses of the representation "as soon as practicable." A suit was in progress at the time with a printing company, and it was not practicable to pay the amount due as the company did not want to settle.

Because of charges made by respondents in their federal suit, petitioner felt obliged to put of record a history of the explosive *Georgia Paneling Supply* litigation. He prepared and filed affidavits in both lawsuits. He executed the accord on December 27, 1982, and received a corporate check on January 3, 1983.

Petitioner learned of an egregious smear on January 12, 1983, perpetrated by respondents on December 8, 1982, embodied in a letter. He researched Georgia law. *Featherston v. Richardson*, 68 Ga. 501 (1882), holds that a beneficiary of a trust can also be the trustee. An unexecuted trust renders the accord into an executory accord. An executory accord can be repudiated at any time prior to receipt of all of the consideration. *Taylor v. Central of Ga. Ry. Co.*, 99 Ga. App. 224, 108 S.E.2d 103 (1959). Petitioner had not received, as beneficiary, all of the $100,000 consideration at that time. Thus, there was no prohibition on petitioner re-suing respondents so long as International was given credit for the payment (and it was). *Atlanta Life*

Insurance Co. v. Walker, 53 Ga. App. 80, 184 S.E. 776 (1936).

As there were genuine issues of material fact mandating jury trial, petitioner determined to sue International again.

B. Course of Proceedings.

1. Trial Court.

Respondents filed a motion for summary judgment, not on the ground that the affidavits were false and that truth was a complete defense, but on the ground of res judicata. The trial court of Fulton County granted respondents' motion without giving a reason, notwithstanding the fact that petitioner had filed affidavits of third parties and himself, briefs, and had advanced oral argument in opposition to respondents' motion prior to the hearing in the trial court. See order at A-. The judgment of the trial court was a non-money judgment in the sense that the trial court made no money award to any party. There remain pending respondents' counterclaims for breach of contract.

2. Georgia Court of Appeals.

Under Georgia law an order granting a summary judgment on a complaint is a final judgment, and an aggrieved party may file an appeal within 30 days to the intermediate state court, the Court of Appeals of Georgia, because the subject matter of the complaint is not enumerated in Art. VI, Sec. VI, Par. II, III of the 1983 Constitution of Georgia, as being in the exclusive jurisdiction of the Supreme Court of Georgia.

During the thirty-day appeal period, as related in his affidavit at A-00, petitioner assessed the perceived psychology of the case considering the widespread newspaper publicity engendered by the charges in the underlying *Georgia Paneling Supply* litigation. He again researched the substantive law of Georgia. He traveled to the Court of Appeals to obtain the latest compilation of its Rules of Court. Neither the Court of Appeals (nor the Supreme Court of Georgia) had a rule which permitted a penalty to be awarded for frivolous appeal in a non-money case. The

Georgia Supreme Court had held on a number of occasions that the predecessor to OCGA §5-6-6 permitting an award of 10 percent of a money judgment as damages for delay was inapplicable to an appeal from a non-money judgment. *Shepard v. Epps,* 242 Ga. 322, 249 S.E.2d 33 (1978); *Brannon v. Simpson,* 244 Ga.58 257 S.E.2d 541 (1979).

Accordingly, petitioner determined to appeal and filed his notice of appeal on March 2, 1984. After paying costs of $1,700, his appeal was docketed in the Georgia Court of Appeals on May 15, 1984, his appellant's brief was due by May 31, 1984, and oral argument was set for July 25, 1984. Pursuant to a policy statement of the Court, petitioner was allowed to avoid oral argument and to submit his case on the briefs. This he did, and he was not present at oral argument.

3. Passage of Rules of Court.

In the meantime, totally unknown to petitioner, Rule 26 (b) of the Court of Appeals and Rule 14 of the Supreme Court of Georgia were adopted April 4, 1984, and became effective on July 1, 1984. The rules are virtually identical. The absence in the Supreme Court Rule 14 of any reference to "petitioner" suggests that the rule was drafted by and for the Court of Appeals and then amended slightly by the Supreme Court for its own use.

4. November 14, 1984 Opinion.

The Court of Appeals' initial opinion was entered November 14. In Part 3, the court stated:

> "3. It is our determination that the instant direct appeal from a non-money judgment is frivolous. Accordingly, pursuant to Rule 26(b) of this court, we impose, on our own motion, a penalty of $500 against appellant."

When received by United States Mail on November 16, 1984, this was appellant's first actual notice of Rule 26(b).

In a motion for rehearing timely filed, petitioner testified by affidavit (see A-00) that he would not have taken an appeal had he known of the rule because he believed he would lose in the Court of Appeals under existing precedent. Petitioner alleged that application of Rule 26 (b) to his appeal deprived him of property without due process of law under the Fourteenth Amendment and the arbitrary classifications embodied within the rule denied him equal protection of the laws under the Fourteenth Amendment.

5. Opinion of December 10, 1984.

By slip order and later by formal order of December 10, 1984, the Georgia Court of Appeals vacated the November 14 opinion and replaced it with an opinion identical thereto except in Part 3. The court adhered to its conclusion that the appeal was frivolous, noted that Rule 26(b) had become effective July 1, 1984, after the appeal was docketed in the court but before it was "prosecuted." The court expressed some doubt whether it had the authority to impose a penalty on its own motion in the instant appeal, and then "decline[d]" to exercise its discretion to impose a penalty in the case but stated it was notifying the Bar of the rule and that this appeal violated its provisions. As argued elsewhere, "what the court determines to be frivolous" is an arbitrary classification without a standard and is void for vagueness.

The reported opinion bears no evidence that there was a November 14 opinion which was vacated and replaced by the December 10 opinion.

6. Plan to Seek Certiorari or Appeal in Supreme Court of the United States.

Petitioner's business-attracting ability, professional reputation and standing in the community were impugned by, and his money, time and effort were consumed in deflecting, the November 14 opinion by the Court of Appeals. Moreover, the revised opinion of December 10 continued to make an example of petitioner. Therefore, he determined to seek certiorari or appeal to the Supreme Court of the United States. To do so, however, he was required by case law of said court to exhaust his remedies in the

Georgia state court system, which required a petition for a writ of certiorari to the Georgia Supreme Court. *Banks v. California,* 395 U.S. 708, 23 L.E.2d 653,89 S.Ct. 1901 (1969).

7. Certiorari to Georgia Supreme Court.

A petition for a writ of certiorari was filed in the Georgia Supreme Court on December 31, 1984. It cited as error the Court of Appeals' reference to Rule 26(b), claimed that same had deprived him of liberty and property in violation of due process of law and denied him the equal protection of the law under the Fourteenth Amendment. See A-00.

Respondents filed a motion seeking imposition of a penalty under Rule 14 of the Rules of the Supreme Court of Georgia for "filing this frivolous petition for certiorari." See A-00. Note that respondents had not made such a motion in the intermediate state court. Note also that under Georgia law issues not raised below and decided by the intermediate state court may not be decided by the highest state court.

On January 25, 1985, the Georgia Supreme Court denied certiorari, misstated that respondents' motion was for "frivolous appeal," when in fact it was "for filing this frivolous petition for certiorari," and assessed a penalty of $200 against petitioner for frivolous appeal. See A-00.

Petitioner filed a timely motion for reconsideration and affidavit, raising Fourteenth Amendment arguments that application of Rule 14 had deprived him of Due Process of Law and denied him the Equal Protection of the Laws. Petitioner also asserted a violation of right of access to the courts under the First Amendment. The motion was denied February 19, 1985. See Appendix at A-00. The Georgia Supreme Court, on February 21, directed that transmittal of the remittitur be stayed pursuant to petitioner's request in the motion for reconsideration. See A-00.

VIII. DUE PROCESS REQUIRES PREDEPRIVATION NOTICE AND HEARING (BY BRIEFS ONLY).

A. Nature of State Action.

The Fourteenth Amendment's proscription against depriving a person of due process of law applies, of course, to a state. State action complained of is by the Supreme Court of Georgia and the Court of Appeals of Georgia, both constitutional courts. Art. VI, Sec. I, Par. I, 1983 Georgia Constitution. Each is "a court of review," Art. VI, Sec. V, Par. III, Art. VI, Sec. VI, Par. II, *Ibid. The Supreme Court has no original jurisdiction. Kitchen v. State,* 228 Ga. 624, 187 S.E.2d 268 (1972). The General Assembly commands the Supreme Court: "[I]n no appellate case to hear facts or examine witnesses." OCGA §15-2-8(1).

The activity which is complained of is a judicial act in the course of making a judicial decision. The act is applying a rule of court to facts in a justiciable controversy.

Each court on the same date, April 4, 1984, adopted a virtually identical rule to be effective on the same date, July 1, 1984. The Supreme Court's authority to enact rules is found in OCGA §15-2-8, -17, -18. The court also has inherent authority to enact certain types of rules. *Chapman v. Gray,* 8 Ga. 337(2) (1850).Until the last ten years the Supreme Court's position was that where a rule violates a Georgia statute or the United States or Georgia constitutions, the rule must yield. *Brown v. Hutcheson,* 167 Ga. 451 146 S.E. 27 (1928). The court recognized that the Georgia General Assembly had the jurisdiction to pass rules governing appellate review in the Supreme Court. *Gordy v. Dunwody,* 210 Ga. 810 83 S.E.2d 7 (1954). No rule wasto affect the substantive rights of the parties. OCGA §15-2-18(a); see §15-2-17. OCGA §15-2-18(b) appeared to require that a Supreme Court rule pertaining to appellate review be submitted to and ratified by the Georgia legislature. However, in *Shore v. Shore,* 253 Ga. 182, 318 S.E.2d 57 (1984), the court held that where a statute (e.g. OCGA §15-2-4) interferes with its determination of a case coming before it, the statute must yield to the court's inherent power.

"'When the Court of Appeals was established in 1906 by constitutional amendment, it was provided that the "laws relating to the Supreme Court as to . . . the powers, practices, procedure, times of sitting and costs of the court . . . shall apply to the Court of Appeals. . . ."'" *Raybestos-Manhattan, Inc. v. Moran,* 248 Ga. 461, 284 S.E.2d 256 (1981) (a case in which petitioner served as counsel for defendant). On July 1, 1983, a new constitution became effective in Georgia. The quoted constitutional provision from the 1976 and earlier constitutions was omitted. While the Court of Appeals has inherent power to enact rules to govern its own internal practice, *Chapman v. Gray,* 8 Ga. 337(2) (1850) (dictum), it lacks power to enact Rule 26(b). Although petitioner raised this issue in the Court of Appeals and in the Supreme Court, they summarily rejected the contention.

Supreme Court Rule 14 and Court of Appeals Rule 26(b) permit the courts to impose a penalty on "an appellant" in enumerated appeals "which the court determines to be frivolous." The amount of the penalty may be as high as $500 which is the amount of the maximum fine which can be imposed by the Supreme Court for a criminal contempt, OCGA §15-2-8(6), but without the required notice, hearing, criminal burden of proof.*Garland v. State,* 253 Ga. 789, S.E.2d (198).

B. Scope of Review.

The United States Supreme Court holds that Fourteenth Amendment proscriptions apply to rules issued by a state supreme court, *Mayer v. Chicago,* 404 U.S. 189, 30 L.E.2d 372, 92 S.Ct. 410 (1971) (Rule 607 of Illinois Supreme Court providing for new trial transcripts to indigents in felony cases only); and for a state superior court, *In re Griffiths,* 413 U.S. 717, 37 L.E.2d 910, 93 S.Ct. 2851 (1973) (Rule 8[1] of Connecticut Practice Book requiring United States citizenship for Bar membership); and to similar state statutes, *Rinaldi v. Yeager,* 384 U.S. 305, 16 L.E.2d 577, 86 S.Ct. 1497 (1966) (New Jersey statute invidiously discriminating among indigent prisoners who are incarcerated and those who are not regarding reimbursement to county for cost of appellate transcript). Both Georgia courts give mouth service to this principle. *Bickford v.*

Nolen, 240 Ga. 255, 240 S.E.2d 40 (1977), *affirming* 142 Ga. App. 256, 235 S.E.2d 743 (1977).

The Court also has held that "Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed." *Lambert v. California,* 355 U.S. 2 L.E.2d 228, 231, 78 S.Ct. 240 (1957).

C. Standard of Review.

As shown in detail elsewhere, the Georgia statute that the subject rules of court pattern is the predecessor to OCGA §5-6-6, enacted in 1845, the same year the Georgia Supreme Court was established. That court has observed: "This provision [is] in the nature of a penalty." *Felker v. Johnson,* 189 Ga. 797, 806, 7 S.E.2d 668 (1940), which is in accordance with the decisions of most states that such rules and statutes are in derogation of the common law and are therefore to be strictly construed. *McKendrick v. Lyle Cashion Co., 234 Miss. 325* 106 So.2d 509 (Miss. 1900) (statute is "highly penal and must be strictly construed[1]1); *Jackson v. East Baton Rouge Parish School Bd.,* 348 So.2d 739 (La. App. 19 77). Georgia courts strictly construe documents against the draftsman. *Perling v. Citizens & Southern Nat. Bank,* 250 Ga. 674, 676, 300 S.E.2d 649 (1983); *Hill v. John P. King Mfg. Co.,* 79 Ga. 105, 109, 3 S.E. 445 (1887); see *Ranger Ins. Co. v. Culberson,* 454 F.2d 857 (5th Cir. 1971) (citing to predecessor of OCGA §13-2-2).

D. Cases in Which This Court Has Imposed Sanctions.

In 1983, this Court imposed an award of $500 damages against the petitioner in *Tatum v. University of Nebraska-Lincoln,* U.S. 77 L.E.2d 1346, but first it directed him to respond to respondent's motion, presumably under Rule 49.2, in 30 days. 75 L.E.2d 804 (1983).

This court's authority is Rule 49.2, which is itself based on an Act of Congress. 28 U.S.C. §1912. In *Gibbs v. Diekma,* 102 U.S. 000, 26 L.Ed. 177 (1880), the court ruled: "[I]t is so apparent that the appeal was vexatious and for delay only, that we adjudge to the appellees $500 as just damages for their delay." The record shows, however, that the Court permitted counsel for appellant to appear and argue the appeal. 26 L.Ed. at 178. Similarly, the Court allowed appellant to appear and submit argument on a writ of error in *Deming v. Carlisle Packing Co.,* 226 U.S. 102, 57 L.Ed. 140 (1). The Court there held that it could assess a five percent penalty where the writ was dismissed for insubstantiality. Again appellant's counsel was permitted to appear and submit argument to the Court in *Wagner Electric Mfg. Co. v. Lyndon,* 262 U.S. 226, 67 L.Ed. 961 43 S.Ct. 589 (1923). The court awarded damages although the appeal was not from a money judgment.

In *Slaker v. O'Connor,* 278 U.S. 188, 73 L.Ed. 258, 49 S.Ct. 158 (1929), counsel for appellant was allowed to argue the cause and submit a brief. The court declined to hear counsel for appellees and awarded them damages for delay. Counsel were treated similarly in *Roe v. Kansas ex rel. Smith,* 278 U.S. 191, 73 L.Ed. 259, 49 S. Ct. 160 (1929), and a penalty was awarded on dismissal.

It should be pointed out that in *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 65 L.E.2d 488, 100 S.Ct. 2455 (1980), concerning the different issue of an award of attorney's fees for bad faith litigation, this Court stated: "Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." 65 L.E.2d at 501-2.

E. Recent Cases from Other States.

In *Marriage of Flaherty,* 31 Cal. 3d, 183 Cal. Rptr. 508, 646 P.2d 179 (1982), the California Supreme Court held as follows:

> "Penalties for prosecuting frivolous appeals should not be imposed without giving fair warning, affording the attorney an opportunity to respond to the charge, and holding a hearing. Further, when imposing sanctions, the court should provide the attorney with a written statement of the reasons for the penalty." 646 P.2d at 190.

The right to a hearing was recognized by the Maryland Court of Special Appeal this year, but noted that the ap-

pellant did not ask for and thus waived a hearing. Blanton v. Equitable Bank, N.A., 61 Md. App. 158 485 A.2d 698 (Md. App. 1985). It is not clear whether a hearing is required in Arizona, *Evans v. Arthur,* 139 Ariz. 362 678 P.2d 943 (1984), or in Oregon, *Broyles v. Estate of Brown,* 295 Ore. 795, 671 P.2d 94 (1983).

F. The Process to Which Petitioner Is Due When Penalty Is Inchoate.

This Court requires a due process analysis to consider the three distinct factors identified in *Mathews v. Eldridge,* 424 U.S. 319, 335, 47 L.E.2d 18, 96 S.Ct. 893 (1976):

> "[F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 47 L.E.2d at 33.

G. Petitioner's Private Interests.

Petitioner is a licensed attorney practicing law in Atlanta, Georgia. He places great importance in his sworn word. For example, the instant litigation was commenced as the result of an egregious smear by the respondents regarding petitioner's affidavit. It concerned procedural irregularities undergirding a series of cases reviewed twice in this Court. International is a former client and two of the respondents are attorneys who retained petitioner to make serious charges about those irregularities. Petitioner's honesty impugned by their statement that: "We of course reject any suggestion that the contents of [petitioner's] scandalous affidavit even remotely relate to the truth." Petitioner's honesty about that particular affidavit and in all matters in general is relevant to any court's perception of the trust they can place in his judgment on a legal issue and on his statement of the facts of a case in which petitioner is appearing for a client or even himself. Clients also desire to employ an attorney who is perceived to be honest with and by the courts.

Petitioner also asserts an interest is being perceived as competent by the courts, the legal profession and the general public. A ruling that he has personally handled his own frivolous appeal lowers the perception of competence. Potential clients who do not come to him because of the lower public perception diminish his income.

Petitioner's financial ability to pay a $200 penalty to the Georgia Supreme Court is not an issue, but he will lose $200 that he might have spent for the care of dependents.

As a citizen, Petitioner has a right of access to the courts of Georgia and a right to prosecute an appeal from a lower court judgment which aggrieves him. See infra. As an attorney he has a right to represent himself or another in the same endeavors.

A person's interest in property, the $200, is clearly recognized. A person's interest in his business integrity is also recognized. *Old Dominion Dairy v. Secretary of Defense*, 631 F.2d 953, 963 (D.C. Cir. 1980); *Gardiner v. A.H. Robins Co., Inc.*, 747 F.2d 1180 (8th Cir. 1984). The use by the Court of Appeals of his case as an exemplification of a frivolous appeal for the State Bar in the December 10, 1984 opinion harmed his liberty interest in the same sense as the respondent's in *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 27 L.E.2d 515, 91 S.Ct. 507 (1971). His integrity and competence and access to the courts are related to the exercise of his right to practice law in Georgia and thus within the Court's analysis in *Paul v. Davis*, 424 U.S. 693, 47 L.E.2d 405, 96 S.Ct. 1155 (1976).

H. Risk of Erroneous Deprivation of Petitioner's Private Interests by Procedure Used.

Petitioner mentioned did not brief in the Court of Appeals or, initially, in the Supreme Court the issue whether the accord established a trust. The accord stated that it did, and he thought it was obvious. Because the opinions do not mention the fact that the $100,000 was received in trust, it seems likely that petitioner did not get his point across.

The imposition of the $500 penalty by the Court of Appeals was such a shock that he did not have time to brief the trust issue in light of the research required to learn when the rules were adopted, when they became effective, what they meant, and under what statutory authority they were enacted. Petitioner perceived that he needed to file an affidavit to substantiate the date he first found out about the rule. Then he had to research the constitutional law issues regarding deprivation of due process under the Fourteenth Amendment as a result of the court's own motion. Petitioner put his priorities in the right place at this time: The court removed the penalty, but he did not brief the trust issue until after the Supreme Court denied certiorari and imposed its $200 penalty. Just as petitioner thought was obvious, Georgia does recognize a trust which has one person to be both trustee with important active duties and beneficiary. *Featherston v. Richardson,* 68 Ga. 501 (1882).

The state court's precipitous actions in imposing the penalties demonstrate why they should give notice of the penalty imposition. Had that occurred, petitioner would have spent the time researching the trust issue and would have found *Featherston v. Richardson* earlier, and not relied on his thought that the issue was clear and not as complicated as the others.

There are also other risk factors. This was a new rule for the Supreme Court. It had never had such a rule. It had always relied on the statute, OCGA §5-6-6. It also differed from the Court of Appeals' old Rule 26. They both needed the adversarial process to examine into the possible sources of power for promulgation of the rule, and even to suggest enactment was an abuse of power, which petitioner thinks is the case under Georgia law. See infra. Furthermore, they needed critical examination of the language of the rule. As shown elsewhere the language of the Supreme Court rule is ambiguous as to whom it covers.

There are no unusual factors present why the state courts should grant a hearing after imposition. A hearing before imposition is preferred. *Fuentes v. Shavin,* 407 U.S. 67 32 L.E.2d 556 92 S.Ct. 1983 (1972). Despite the fact that an initial judicial opinion is not final until a time period expires, a certain permanence inheres in a written opinion. The opinion can be used for ulterior purposes. For example, in this case, even after it had been vacated, respondents filed the November 14, 1984, opinion in the trial court.

I. Governmental Interest in Rules.

The function involved is judicial determination of every appeal filed in the Georgia courts of review. This is not an imposition. It is their duty.

The substitute procedural requirement suggested by the petitioner is written notice and a hearing by briefs 30 days later. Just as this Court instituted for *Tatum Regents, v. Univ. of Nebraska-Lincoln,* 75 L.E.2d 804 (1983).

There would be no administrative burden. Surprise impositions of penalty would continue to spawn motions for rehearing (as in this case) and petitions for discretionary review by the highest state court for possible review by this Court (as in this case). (Indeed, the possible increase in these types of petitions is a reason why this Court ought to grant certiorari.) The paperwork would simply consist of a notice or order to counsel that the court was considering imposing sanctions or to file a response to respondent's motion (as in *Tatum*). The court would probably receive a response. The number of these ought not to exceed what would be filed by a blindsided imposition.

Because there is no administrative burden, there will be no fiscal burden. The courts of review are going to be receiving the same number of briefs as before.

Therefore, the Fourteenth Amendment Due Process Clause requires notice to parties on appeal about to be assessed a penalty and a hearing after a reasonable period to prepare a rebuttal on briefs.

IX. GEORGIA SUPREME COURT ABRIDGED RIGHT OF ACCESS TO U.S. SUPREME COURT AND TO ITS OWN PROCEDURES FOR REVIEW.

A. Nature of Right and Standard of Review.

The First Amendment applies to the States by virtue of the Fourteenth Amendment. *N.A.A.C.P. v. Button,* 371 U.S. 415, 9 L.E.2d 405, 83 S.Ct. 328 (1963). "The right of access to the courts is indeed but one aspect of the right of petition." *California Motor Transport Co. v. Trucking Unltd.,* 404 U.S. 508, 30 L.E.2d 642, 646, 92 S.Ct. 609 (1972). This right is fundamental and is "implicit in the concept of ordered liberty" under *Palko v. Connecticut,* 302 U.S. 319, 325, 82 L.Ed. 288, 58 S.Ct. 149 (1937). *Sotto v. Wainwright,* 601 F.2d 184, 191 (5th Cir. 1979). That aspect of right of access to the courts which is involved here is the right to review by an upper court when the right is granted generally. This right, too, is fundamental:

> "This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi v. Yeager,* 384 U.S. 305, 16 L.E.2d 577, 581, 86 S.Ct. 1497 (1966).

The 1983 Georgia Constitution guarantees to petitioner free access to the State's courts of review. Art. I, Sec. I. Par XII. Penalties on some appeals will tend to discourage appeals. *Seale v. Evangeline Parish Police Jury,* 330 So.2d 378 (La. App. 1976).

The standard of review is whether there is a compelling state interest that mandates curtailing the right of petition. *N.A.A.C.P. v. Button,* supra, 9 L.E.2d at 421.

B. Injury to Petitioner's Rights.

Petitioner claims two injuries: one, by the Georgia Supreme Court's abridging his right of access to this Court, and two, by the former's denying his right to an appeal before it, in effect, reversing an exercise of discretion by the Court of Appeals of Georgia on the issue of imposing a penalty.

The Georgia Supreme Court abridged his right of access to the Supreme Court of the United States by imposing a $200 penalty, equalling the filing fee in this Court, when the court knew that (a) federal constitutional issues had been raised in the Court of Appeals and (b) the intermediate state court had reversed its imposition of a $500 penalty upon presentation of the federal constitutional issues, thus demonstrating that the issue was not on its face frivolous.

Georgia's highest state court deprived petitioner entirely of an appeal when it denied his petition for a writ of certiorari to Georgia's intermediate state court. This judicial act was not wrongful in and of itself. What made it constitutionally impermissible is that the state Supreme Court—at the same time—came to a result opposite to that entered by the intermediate state court, to wit: to impose a penalty. Another way of looking at it is that the highest state court ruled that the intermediate state court had abused its discretion in not awarding a penalty.This is a reversal without a hearing on appeal.

C. Lack of Compelling State Interest.

Georgia's highest state court has not officially reported that it is overworked to the Judicial Council of Georgia chaired by its chief justice. Its volume of petitions for certiorari, direct appeals adn original motions/petitions decreased between 1983 and 1984. Attorney/judge disciplinary cases, summary affirmances, applications for discretionary appeal/habeas corpus were up some. Total number of matters filed went up by 15 from 1983 (1589) to 1984 (1604), an increase of .0093 percent. State appropriations went up by 18 percent from 1983 to 1985. Base salaries of justices increased in 1984. *Eleventh Annual Report of the Work of the Georgia Courts,* Judicial Council of Ga. (1985) at 5, 7. There is no compelling state interest in the docket of the federal supreme court.

X. HIGHEST STATE COURT HAS PECUNIARY INTEREST IN $200 PENALTY.

A. Fourteenth Amendment Prohibits Pecuniary Interest in Outcome.

The Fourteenth Amendment requires that no state deprive a person of due process of law. A person's constitutional right to due process of law requires a fair tribunal. A tribunal is not fair if it has a pecuniary interest in the outcome. *Tumey v. Ohio,* 273 U.S. 510, 71 L.Ed. 749, 47 S.Ct. 437 (1927).

Examined in *Tumey* were Ohio statutes which authorized the mayor of the village of North College Hill to try persons apprehended for violation of prohibition laws. Upon conviction the mayor was authorized to "receive or retain the amount of his costs in each case, in addition to his regular salary, as compensation for hearing such cases." 71 L.Ed. 753. Without conviction, the mayor received nothing. Tumey was convicted. The costs imposed were $12 paid directly to the mayor. In a seven month period the mayor made almost $700. The Court held that due process of law was denied to the defendant there.

B. Georgia Supreme Court's Interest.

Rule 14 does not state to whom the penalty is to be paid. Respondents did not ask the court to pay the requested penalty to them. See A-00. Their objection was that petitioner should be assessed "for filing this frivolous petition for certiorari."

Petitioner is an attorney at law. Once the period for review is over he would pay the $200 directly to the court instanter. Such may be required by analogy to Standard 64 of the Rules and Regulations of the State Bar of Georgia. See A-00.

Another approach is to examine the nature of the rule. The Georgia statutes enjoin the court from abriding the substantive rights of the parties or counsel. OCGA §15-2-17, -18. The rule cannot be read to give respondents a right they did not have previously.

Georgia's highest state court did not include a direcion to its clerk to add the amount of the penalty to the remittitur. The Court of Appeals' November 14, 1984 opinion concluded with the following: "Judgement affirmed with direction". Although vacated, this opinion was available to the upper court. In *Hodges v. Hodges,* 235 Ga. 848(3), 221 S.E.2d 597 (1976), now chief justice Hill ruled: "We therefore direct that the clerk enter ten percent damages upon the remittitur."

For these reasons the court has a pecuniary interest in finding petitioner to have brought a frivolous appeal.

XI. RETROACTIVE APPLICATION OF STATE COURT RULES IS ARBITRARY AND CONTRARY TO LEGISLATIVE SCHEME.

A. Standard of Review.

The most recent pronouncement of this Court on the constitutionality of retroactive legislation is *Pension Ben. Guar. Corp. v. R.A. Gray & Co.,* 467 U.S.0, 81 L.E.2d 601, 104 S.Ct. 2709 (June, 1984), which held that the standard of review is whether Congress had a valid reason for enacting national economic legislation five months retroactively. The court found a valid reason and upheld the statute against a Fifth Amendment Due Process attack. If the Court had found the statute had a retroactive effect arbitrarily, it would have found that portion unconstitutional.

The court rules under attack for four months of retroactive application are not to be tested under the Fifth Amendment, which applies to the Federal Government, but under the Fourteenth Amendment. The court rules do not appear to be ordinary economic legislation (although they have a revenue-producing effect as suggested above). The three part analysis of C. Hochman, "The Supreme Court and Retroactive Legislation," 73 Harv. L. Rev. 692 (1960), commends itself and is followed here.

B. Nature of the Public Interest Served by Enactment of Rules.

1. Rules Are Legislative and Not Administrative.

Court rules introduce uniformity into the judicial process. To the extent they speed up the work of the courts the public is pleased. But the public is not interested in court rules. They have some interest in judicial decisions that affect their lives.

In enacting rules of appellate practice a court is not acting in a judicial capacity. If the rules do not affect the substantive rights of parties, the rules are administrative. If they do, they are legislative. Long ago the state supreme court stated the joinder of judicial power with legislative power was "the very definition of tryranny". *Beall v. Beall,* 8 Ga. 210, 229 (1850). The rules are legislative in nature and are one more example of judicial legislation by the Georgia Supreme Court (e.g. *Stokes v. Stokes,* 246 Ga. 273, 273 S.E.2d 169 [1980]).

2. Statutory Background.

OCGA §5-3-31.

From establishment of the State in 1777 to 1845, Georgia had no Supreme Court. The courts of general jurisdiction were the superior courts in the respective counties. There also existed various inferior courts. A party aggrieved by a decision of an inferior court had a right of appeal to the superior court. A jury would be empanelled to hear the appeal.

In 1797, the Georgia General Assembly enacted the predecessor to O.C.G.A. §5-3-31, which reads today as follows:

> "If upon the trial of any appeal it shall appear to the jury that the appeal was frivolous *and* intended for delay only, they shall assess damages against the appellant and his security, if any, in favor of the appellee for such delay, not exceeding 25 percent on the principal sum which they shall find due, which damage shall be specially noted in their verdict." [Emphasis added.] *

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* There is no legislative history in Georgia that is not contained in the statute.

In early cases, *Garrison v. Wilcoxson,* 11 Ga. 154 (1852), and *Hartridge v. McDaniel,* 20 Ga. 398 (1856), the court emphasized that the appeal must be both frivolous *and* intended for delay only before a jury could award damages against the appellant and in favor of the appellee:

> "The damages allowed by the Statute are in the nature of a penalty. Hence the Jury must be satisfied that there is an *intention* to delay the creditor *frivolously.* If there be good ground for the appeal no damages can be recovered, notwithstanding the *intention* was to delay the debt. So, on the other hand, although the cause of appeal be *frivolous,* still, if the *animus*—the intention to delay—be wanting, damages cannot be found. True, the Jury may infer the intention from want of good cause." 20 Ga. at 400. [Emphasis in original.]

In *Garrison v. Wilcoxson,* supra, the state Supreme court defined frivolous appeal as one "that is, unmeaning, trifling, without reason." (11 Ga. at 157). In *Hartridge v. McDaniel,* supra, the court held that if the appellant's attorney testified that he had an honest belief that he had good cause for appeal, his testimony could negate an intention to delay the debt. The holdings of *Garrison v. Wilcoxson* and *Hartridge* were reaffirmed in *Gilmore v. Wright,* 20 Ga. 198 (1856).

In *McMillan v. Lawrence, Smith & Whilden,* 25 Ga. 189 (1858), the court reversed the superior court because it had instructed the jury in such a way as to indicate that the maximum damages of 25 percent should be awarded in every case. The court pointed out that not only was the jury to consider the evidence in the case but "the condition of the country, the value of money and the price of property, and everything which goes to enhance the worth of money." 20 Ga. at 192. The jury was called on to make a factual determination.

OCGA §5-6-6.

At the time the Supreme Court was established in 1845, the General Assembly enacted a statute which bore a resemblance to the 1797 law. OCGA §5-6-6 now reads:

> "When in the opinion of the court the case was taken up *for delay only,* 10 percent damages may be awarded by the appellate court upon any judgment for a sum certain which has been affirmed. The award shall be entered in the remittitur." [Emphasis added.]

The statute requires that the trial court judgment be affirmed by the reviewing court (much like a jury verdict for the appellee would be required in superior court) and be a "judgment for a sum certain" (again like the jury's verdict). The statute directs the court to make a discretionary determination whether "the case was taken up for delay only." (The jury is required to enter the damages.) While it is not clear *on its face* whether a subjective or objective standard is called for, Georgia courts of review are forbidden to hear facts or examine witnesses, OCGA §15-2-8(1), and have employed an objective standard: Is the appeal wholly without color.*Almond v. Bentley Gray, Inc.,* 138 Ga. App. 508, 226 S.E.2d 776 (1976); *Turner v. Turner,* 191 Ga. 123(2), 12 S.E.2d 633 (1940).On the other hand, some benefit to the appellant from a delay would seem to be statutorily implicit, and where the appellant would not benefit from a delay, the court would seem to be called on to enter a discretionary denial. (This appears to be the manner in which the jury would view a case in superior court.) The statute allows an award of "damages," and states that it shall be entered in the remittitur. (As pointed out, the jury would enter its assessment on its verdict.)

Under Georgia law a remittitur is the document issued by the reviewing court to the next lower court. It directs the lower court to give effect to the reviewing court's decision. A remittutur issued by the Georgia Supreme Court upon denial of certiorari would be directed to the Court of Appeals. Rule 000. If the court should award an appellee damages for delay, the remittitur would carry this direction to the lower court. The Court of Appeals would issue its own remittitur to the trial court with the same direction and the appellee would pay the sum to the appellee in the trial court.

The statute indicates that the award is made against an appellant and to the appellee. Since "damages" is used it would appear that the appellee would actually have had to sustain damages equal to 10 percent of a money judgment. The cases either presume that damages equal or exceed 10 percent of the judgment, or they do not analyze the issue. See, e.g. *Hodges v. Hodges,* 235 Ga. 848(3), 221 S.E.2d 597 (1976). The superior court jury would review the evidence and would consider the appellee's damages. *McMillan v. Lawrence, Smith & Whilden,* supra.

OCGA §5-4-18.

Prior to 1857 the superior courts were given the right to hear writs of certiorari over certain decisions of inferior tribunals. This led in 1857 to the legislature enacting OCGA §5-4-18 to give the *judges* power to award to a respondent damages for delay from the petitioner who took a certiorari for delay. The enactment of this statute underscores the legislature's knowledge that there is a substantial difference between appeal and certiorari, and what covers the former does not necessarily cover the latter.

3. Regulatory Background.

Old Court of Appeals Rule 26 (Now Rule 26[a]).

Before the Supreme Court had adopted Rule 14 as of July 1, 1984, it had no rule pertaining to damages for delay only. By contrast, the Court of Appeals had adopted Rule 26. See A-00.

Old Court of Appeal's Rule 26 permitted the court to enter "an assessment" against an appellant for non-appearance at the call of the case on the oral argument calendar. It should be noted that the court now invites counsel not to argue a case orally, but to submit the matter on briefs. (This is Rule 8[a]; at the time of oral argument before the Court of Appeals on July 25, 1984, it was a rubric on the notice of oral argument.) The thrust of the rule is to assess appellant either for appealing a case and not filing a brief *or* not appearing to argue the case orally. The old rule ties in to OCGA §5-6-6 by requiring that the trial court judgment be affirmed before the assessment be entered. The

"10% damages for delay" is available only on appeal from a money judgment, and it suggests a presumption that appellee or counsel has expended 10 percent of the judgment by appearing at oral argument either by brief or argument. The rule seems to be a good indication of the type of delay the court objected to, namely, wilful infliction of loss of interest upon an appellee, as opposed to poor judgment. When Rule 26(b) was made effective July 1, 1984, old Rule 26 was designated Rule 26(a), but this was not reflected in the compiled rules until March 1, 1985. No case imposing damages under this rule was found.

New Court of Appeals' Rule 26(b).

New Rule 26(b) and Supreme Court Rule 14 are identical except that (a) the Court of Appeals' rule does not include a reference to "petition for certiorari" between "application for interlocutory appeal" and "motion," and 26(b) does not refer to an "applicant" or to a "petitioner," but only to an "appellant."

The remaining analysis of the rule is thus identical to and pursued in the next section dealing with Rule 14.

Rule 14.

Turning to Georgia Supreme Court Rule 14, the rule calls for imposition of a *penalty*. The words "damages" and "assessment" are not used as in the 1797 and 1845 legislation. The penalty can be as high as $500. That is the same as the maximum amount that a person can be fined for perpetrating a contempt of the Supreme Court of Georgia. OCGA §15-2-8(6). There is no schedule for determining what fraction of the $500 should be imposed for varying degrees of misfeasances in frivolous appeals.

The rule applies to "an appellant." The 1983 Georgia Constitution specifies that the court has appellate (1983 Georgia Consitution, Art. VI, Sec. VI, Par. II, III) and certiorari jurisdiction (id. at Par. V). Facially, the Supreme Court rule omits a "petitioner" under certiorari jurisdiction. It means otherwise as shown by imposition on petitioner. This establishes that the rule is impermissibly vague in violation of the Fourteenth Amendment. Rule 14 does not designate the beneficiary of the penalty. There is no reason to infer that the penalty will be awarded to the appellee because appellee's damages are not mentioned. They may be material to the amount of the penalty. Appellees' damages implicit in the 1797 and 1845 legislation suggest how the penalty will be collected from the appellee. There is no reason to infer that the penalty will be entered on the remittitur. The court could require the penalty to be paid directly to it. A lawyer such as petitioner would pay the amount directly to the court within ten days after further legal redress should expire. The court stayed the remittitur in this case because petitioner asked it to do so for the reason that should the court determine to add the penalty to the remittitur and then should release the remittitur, the Supreme Court would lose jurisdiction. Without jurisdiction, should this Court reverse the Georgia Supreme Court, the latter would lack jurisdiction to change the judgment. *Seaboard v. Jones,* 199 Ga. 907, S.E. (19).

The rule gives the Georgia Supreme Court complete discretion in adjudging what is frivolous. The Court may award a penalty in an appeal "which the Court determines to be frivolous." However, there is no standard for directing the court's discretion. If Georgia law had an accustomed meaning for frivolous, which it does not, the court is given authority to depart from that meaning and impose a penalty on a direct appeal not customarily considered frivolous. Conversely, the court could determine not to award a penalty even if the appeal is frivolous, by whatever standard could be articulated. The 1797 and 1845 legislation gave a standard: delay only.

Another area of discretion reserved in the court is that it may impose a penalty with or without a motion. Neither of the two statutes, 1797 or 1845, required a motion. Only due process of law could protect an appellant. The rule is stated to apply "only to those cases in which there is no money judgment." The purpose for the limitation is probably to avoid duplicating OCGA §5-6-6 discussed above, which applies to "judgments for a sum certain." Non-money judgments could be as diverse as a decree granting a divorce, enjoining a threatened act, granting a motion to dismiss a complaint, or for summary judgment in favor of a party reserving possibly the issue of damages to be decided later, a declaratory judgment as to the respective rights of parties before it, etc. The court seems to fill out the other possible types of judgments that could be appealed.

It may be observed that the rule does not apply to criminal cases of any sort. This analysis is pursued in Argument XIII dealing with Equal Protection of the Law.

4. Comparison of Rules with Statutes Named.

What appears from the foregoing is that when the Georgia legislature created the Supreme Court in 1845, it gave to it a degree of protection from appellants as the legislature had given to the superior courts in 1797. However, the protection was different. (1) Whereas the superior court judges have no power to award damages (the jury is the arbiter), the Supreme Court does have power to award damages (the judges make the decision). (2) The jury was compelled to award the damages but the judges have discretion not to. (3) The standard for awarding damages in the superior court is twofold: the appeal must be frivolous *and* the appellant must intend only to delay collection of the appellee's judgment. In the Supreme Court the standard for awarding damages is singular: the appellant must only intend to delay collection of the money judgment. Thus the judges could not award damages for frivolous appeal unless it was so without color that the court could infer that its only purpose was to delay the appellee in the collection of his money judgment. (4) The percent of the judgment which the superior court may award is 25 percent. The percent the Supreme Court may award is 10. (5) The appellant can collect his damages in a judgment upon the jury verdict in superior court. The appellee in the Supreme Court must await remittitur and entry in the trial court. There are similarities: (1) the judgment must be for a sum certain; (2) the case must go to verdict or be affirmed; (3) the damages are imposed on the appellant; and (4) against the appellee.

When the Georgia Supreme Court promulgated Rule 14 effective July 1, 1984, OCGA §5-3-31 and OCGA §5-4-18 were on the books.

It follows from the foregoing that since the 1845 act (OCGA §5-6-6) had been on the books for 99 years without change, when on July 1, 1984, the Supreme Court made Rule 14 effective, the legislature was (1) satisfied (a) with the law, (b) with its application by the Georgia Supreme Court and Court of Appeals, (2) had no plan to expand the legislative scheme to reach other types of appellants, such as those who prosecute appeals from non-money judgment for delay only, (3) intended that the statutory scheme not be expanded to reach such other appellants.

Lending support to this hypothesis is OCGA §15–2–18 which requires that when the Supreme Court adopts rules as to practice and procedure for appeal or review in all cases, the rules shall be reported by the court to the General Assembly at its next regular session to consider such rules, and provides if they are not ratified and confirmed they shall not take effect.

C. Nature of the Right Affected by Retroactive Rules

Until the rules of court at issue here became effective, petitioner had a right under Georgia Law to file a frivolous appeal so long as he did not take up the matter for the purpose of delay only. This right extended to appeals from money and non-money judgments. Petitioner had a right to file a frivolous appeal from a non-money judgment even if his purpose was delay only. See *Jackson v. Jackson,* 178 Ga.203, 172 S.E.2d 459 (1934). The rights existed under legislation enacted by the Georgia General Assembly which is presumed informed on the operation of the courts.

Petitioner knows of no statement of either appellate court in Georgia that they are being overwhelmed by appeals, much less by frivolous appeals. Petitioner knows of no pending legislation in the General Assembly to regulate frivolous appeals.

Justice Brennan has acknowledged the possibility that "a State [may] ha[ve] some interest in entertaining frivolous lawsuits". *Bill Johnson's Restaurants, Inc. v. NLRB*, –U.S.–, 76 L.E.2d 277, 297, 103 S.Ct. (1983). One reason is that the courts offer an alternative to violence, and from the beginning, Georgia has been a place of lynchings, fighting and disorderliness.

M. Lane, *People of Georgia* (Beehive 1975) at 6,99-100,103. The state legislature has balanced this interest only where litigation has taken place, the appellee has a money judgment, and the appellant is seeking only to delay payment of the money. Only at this point does the state intrude.

D. Extent of Abrogation of Asserted Preenactment Right.

The rules totally eliminate the right to take a frivolous appeal regardless of purpose. A penalty may be imposed alike on innocent or wilful appellants. The distinction between money and non-money judgments explicit in the General Assembly's legislative scheme from 1797 to 1984 is obliterated.

E. Changes Were Abrupt.

Retrospective civil legislation is prohibited if the consequences are particularly harsh and oppressive. *U.S. Trust Co. v. New Jersey,* 431 U.S. 1, 52 L.E.2d 92, 97 S.Ct.1505 (1977). Affidavits of petitioner demonstrate that the changes were harsh and oppressive and the matter contained herein show same were abrupt.

F. Conclusion.

Neither court gives a reason for applying the rules retroactively. They have just done so by fiat. If their purpose was to deter petitioner, they acted irrationally because his appeal was already perfected when the rules were adopted and became effective. If the rules were meant to cause petitioner to drop the appeal in process, it was a bill of attainder and impaired a vested right. Therefore, the rules are arbitrary and irrational.

XII. RETROACTIVE APPLICATION OF SUBSTANTIVE LAW IS ARBITRARY

In *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 74 L.Ed. 1107 (1930), this Court held that a violation of the Fourteenth Amendment due process clause may be accomplished by the state judiciary in the course of construing an otherwise valid state statute. OCGA §53-23-3(a) is an otherwise valid state law which permits the creation of trusts in Georgia. The accord, by its explicit terms, creates a trust. A-83, ¶1 The Georgia courts ignored this provision and did not treat the accord as a trust. This was the first time in more than 100 years that a trust such as petitioner's was not treated as a trust. *Featherston v. Richardson,* 68 Ga. 501, (1882), A-76. Therefore, the state has deprived petitioner of all existing remedies for the enforcement of a vested right which the state has no power to destroy.

XIII. EQUAL PROTECTION OFFENDED BY EXEMPTION OF FRIVOLOUS CRIMINAL APPEALS

This Court has assumed that a state statute limiting frivolous criminal appeals would be valid. *Rinaldi v. Yeager,* 384 U.S. 305, 16 L.E.2d 577, 581, 86 S.Ct. 1497 (1966). The rule of this Court, 49.2, does not discriminate by omitting criminal appeals. Neither does Rule 38 of the federal courts of appeals. This Court has also observed that any legislative classification should roughly approximate the nature of the problem perceived, that it should accommodate competing concerns both public and private, and that it should account for limitations on practical ability of state to remedy every ill. 457 U.S. 202, 102 S. Ct. 2382 (1982).

The distinction drawn by the state court rules at issue is irrational by this test. See *Huguley v. State,* 253 Ga. 709, 321 S.E.2d 729 (1985).

XIV. PROCEDURAL DUE PROCESS ABHORS VAGUENESS OF COURT RULES

The Court's analysis of whether a state statute or rule is impermissibly vague is found in *Grayned v. City of Rockford,* 408 U.S. 104, 108-9, 33 L.E.2d 222, 92 S.Ct. 2294 (1972), and *Smith v. Goguen,* 415 U.S. 566, 39 L.E.2d 605, 94 L.E.2d 1242 (1974). A court of appeals opinion employing this analysis is *diLeo v. Greenfield,* 541 F.2d 949 (2d Cir. 1976).

Since statutory construction is involved, this Court's observation in *United States v. Apfelbaum,* 445 U.S. 115, 63 L.E.2d 250, 257, 100 S.Ct. 948 (1980) is apt: "It is a well-established principle of statutory construction that absent clear evidence of a contrary legislative intention, a statute should be interpreted according to its plain language."

XV. CONCLUSION

For the reasons stated petitioner asks this Court to grant a writ of certiorari to the Supreme Court and Court of Appeals of Georgia.

> "[O]ne might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." *Stanley v. Illinois,* 405 U.S. 645, 31 L.E.2d 551, 562, 92 S.Ct. 1208 (1972).

Respectfully submitted,

WILLIAM B. HOLLBERG
WINFORD KENT BISHOP

Co-Counsel for Petitioner.

XVI. CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I have served three copies of the within and foregoing "Petition for a Writ of Certiorari to the Supreme Court and the Court of Appeals of Georgia" upon counsel for each respondent by depositing same in the United States Mail, sufficient postage prepaid, properly addressed to same at their last known business address, as follows:

INTERNATIONAL PAPER COMPANY,
JEFFREY M. SMITH, CHARLES MYNEDER,
BEN R. SWANK, JR.
c/o Jeffrey M. Smith, Esq.
Bondurant, Miller, Hishon &
Stephenson
2200 First Atlanta Tower
Two Peachtree Street, N.W.
Atlanta, Georgia 30383

This _____day of May, 1985.

____
Counsel for Petitioner.

68930. BISHOP v. INTERNATIONAL PAPER COMPANY et al.

CARLEY, Judge.

Appellant-plaintiff is an attorney. He was engaged to perform certain legal services for appellee-defendant International Paper Company (International). Subsequently, International discharged appellant and retained the legal services of other attorneys, who are the remaining appellee-defendants. A dispute arose concerning the amount of compensation that International owed appellant. This dispute resulted in International's filing an action against appellant in federal court. Appellant, in turn, filed an action against appellees in the Superior Court of Fulton County.

Thereafter, appellees mailed a proposed "Settlement Agreement and General Release" to appellant. Under the terms of the proposed agreement, appellant would receive the sum of $100,000 and the federal suit against him would be dismissed with prejudice, in consideration for which appellant would dismiss his state action with prejudice. Additionally, under the terms of the proposal, appellant would agree to release and forever discharge appellees "from any and all claims, demands, actions, causes of action, damages and suits at law and equity of whatsoever kind, arising in any way whatsoever, directly or indirectly, from the matters described in this 'Settlement Agreement and General Release,' the afore-described suits and litigation and all other claims of any kind whatsoever whether or not related to the aforesaid matters, suits, and litigation, it being the intention of the parties that their rights be limited to the provisions of this agreement." The proposal also contained appellees' similar agreement to release and forever discharge appellant. Finally, the proposal contained a provision that the parties would "agree and covenant that the terms of this Agreement shall dispose of any and all obligations and rights which may be deemed to have existed in regard to the matters, claims, suits and litigations described herein and all other claims of any kind whatsoever whether or not related to the aforesaid matters, claims, suits and litigation that existed prior to the execution of this Agreement. . . ."

When the proposed "Settlement Agreement and General Release" was sent to appellant, it already bore the notarized signature of each of the appellees. The agreement indicated that each appellee had affixed his respective signature over a period of time encompassing the latter part of October 1982 and the early part of November 1982. Appellant signed the agreement on December 27, 1982. A check for $100,000, dated December 28, 1982, and made payable to appellant, was delivered. The face of this check provided that it was "[f]or settlement of all claims by [appellant] against [appellees] as detailed in Settlement Agreement and General Release signed by [appellant] on December 27, 1982, and signed by other parties." Appellant negotiated the check. As provided in the agreement, the two pending lawsuits were then dismissed with prejudice.

However, in March of 1983, appellant instituted the instant lawsuit against appellees. The first six counts of appellant's instant complaint constituted the same allegations that had been made in the previous action that appellant had dismissed with prejudice. The seventh and final count was an allegation that appellant had been libeled. The alleged libel was contained in a letter dated December 8, 1982, addressed to four individuals and signed by one of the appellees. The subject of the letter was an affidavit that appellant had filed in the then-pending litigation between the parties, in which affidavit appellant had made certain assertions concerning the four individuals to whom the letter was addressed. The gist of the letter was to inform the four addressees that appellant's affidavit had put their actions "in issue" in the then-pending litigation, with the result that deposing them would be necessary. The alleged libel in the letter was the following sentence: "We of course reject any suggestion that the contents of [appellant's] scandalous affidavit even remotely relates to the truth."

Appellees answered appellant's complaint, raising by way of defense the previous settlement agreement and the dismissal of the previous litigation. Appellees' subsequent motion for summary judgment was granted and appellant appeals.

1. It is clear that summary judgment was properly granted as to the first six counts of appellant's complaint. Those counts merely realleged the same claims against appellees which were raised in the previous action that appellant dismissed with prejudice. A dismissal with prejudice "means that the same plaintiff cannot again sue [the] same defendant[s] on [the] same cause[s] of action." *Rowland v. Vickers,* 233 Ga. 67, 68 (209 SE2d 592) (1974). "A dismissal with prejudice *operates* as an adjudication on the merits. It is a final disposition. It bars the right to bring another action on the same claim or cause. [Cit.]" (Emphasis in original.) *Marchman & Sons, Inc. v. Nelson,* 251 Ga. 475, 477 (306 SE2d 290) (1983); *Coleman v. State Farm Mut. Auto. Ins. Co.,* 104 Ga. App. 328 (121 SE2d 833) (1961).

Moreover, under the express and unambiguous terms of the "Settlement Agreement and General Release," appellees were to be released and discharged from any liability to appellant with regard to those six claims upon payment of $100,000 to appellant. It is undisputed that appellant executed the agreement and received the contemplated consideration. "[P]ayment of the full amount of consideration in accordance with the terms of a contract of release extinguishes the releasor's cause of action. [Cit.]" *Service Fire Ins. Co. v. Ledbetter,* 112 Ga. App. 333 (1) (145 SE2d 97) (1965).

The record also demonstrates that appellant has made no tender back to appellees of the $100,000 that he received as consideration under the agreement. For this additional reason, he is barred from reasserting the claims encompassed in the first six counts of his instant complaint. See *Mack v. Shearer,* 222 Ga. 33 (148 SE2d 314) (1970).

Accordingly, summary judgment was properly granted to appellees as to the first six counts of appellant's complaint. Appellant's arguments to the contrary are unavailing and warrant no further discussion.

2. The only issue remaining is whether the summary judgment was properly granted as to the libel count. In this regard, the record clearly demonstrates that the communi-

cation was privileged. "An attorney at law has a conditional privilege to make, during the progress of a trial, such fair comments on the circumstances of the case and the conduct of the parties in connection therewith as in his judgment seem proper." *Atlanta News Publishing Co. v. Medlock,* 123 Ga. 714 (5) (51 SE 756) (1905). The record demonstrates that, pursuant to the holding of *Sherwood v. Boshears,* 157 Ga. App. 542 (278 SE2d 124) (1981), summary judgment was properly granted as to the libel count.

Moreover, it is clear that this purported libel claim arose, directly or indirectly, from the then-pending litigation and that it was in existence at the time appellant executed the agreement. Accordingly, the libel claim was encompassed under the clear and unambiguous terms of the release agreement. "'A release may be avoided where the releasor can show that it was executed for mutual mistake . . . *unless* it further appears that the parties intended that claims for all injuries, whether known or unknown at the time of the execution of the release, be relinquished.' [Cit.]" (Emphasis supplied.) *Kennedy v. Bateman,* 217 Ga. 458, 461 (123 SE2d 656) (1961). The parties to the agreement in the instant case "clearly anticipated that other injuries might show up later when they recited in the release that the [appellees] were being released and forever discharged 'from all . . . suits . . . claims and demands whatsoever . . ." arising from the underlying litigation (*James v. Tarply,* 209 Ga. 421, 423 (73 SE2d 188) (1952)), and that the agreement would "dispose of any and all obligations and rights which may be deemed to have existed in regard to" the litigation, as well as "all other claims of any kind whatsoever whether or not related to the . . . litigation that existed prior to the execution of" the agreement. Accordingly, the purported libel claim was covered by the all-inclusive settlement and release agreement. As to the seventh count of appellant's complaint, summary judgment was properly granted to appellees.

3. It is our opinion that the instant appeal is frivolous. Under Rule 26 (b) of this court, we are now authorized, with or without motion, to impose a penalty, not to exceed $500, against the appellant who brings a frivolous appeal

from a non-money judgment. Rule 26 (b) became effective July 1, 1984. Appellees have not invoked Rule 26 (b). We will not engage in a discussion of whether Rule 26 (b) is authority for the imposition of a penalty on our own motion in the instant appeal, which was docketed in this court prior to July 1, 1984, but which was prosecuted thereafter. We will simply hold that if Rule 26 (b) constitutes such authority, we decline to exercise it here. However, the bar should be apprised of the existence of Rule 26 (b) and of our opinion that the instant appeal is such as would come within its ambit.

Judgment affirmed. Birdsong, P.J., and Beasley, J., concur.

DECIDED DECEMBER 10, 1984.

Action on fees. Fulton Superior Court. Before Judge McKenzie.

COURT OF APPEALS
OF THE STATE OF GEORGIA. **ATLANTA, December 10, 1984**

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

68930. WINFORD KENT BISHOP v.
INTERNATIONAL PAPER COMPANY
et al. (C-97539)

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

NOTE: Revised on Rehearing. Please substitute new pages 8 & 9 for old pages in original opinion dated November 14, 1984. (enclosure)

COURT OF APPEALS
OF THE STATE OF GEORGIA.

CLERK'S OFFICE **ATLANTA, December 10, 1984**

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

ALTON HAWK, CLERK

41894. BISHOP v. INTERNATIONAL PAPER COMPANY et al.

PER CURIAM.

This is a petition for the writ of certiorari to the Court of Appeals.

The petition for certiorari is denied.

On motion of the respondent for imposition of sanctions against the petitioner for frivolous appeal, a penalty of $200 is imposed against the petitioner for frivolous appeal. See Rule 14 of Rules of the Supreme Court of Georgia.

All the Justices concur, except Smith, J., not participating.

DECIDED JANUARY 25, 1985.

Certiorari to the Court of Appeals of Georgia — 173 Ga. App. 34.

68930. BISHOP v. INTERNATIONAL PAPER COMPANY et al. (C-97539)

COURT OF APPEALS OF GEORGIA.

It is ordered that the judgment in this case rendered on November 14, 1984, be vacated and the opinion be withdrawn from the files, and the judgment of this court of December 10, 1984, be substituted therefore [sic].

41894. BISHOP v. INTERNATIONAL PAPER COMPANY et al.

CLERK'S OFFICE, ATLANTA, 2/19/85
SUPREME COURT OF GEORGIA.

The motion for a reconsideration was denied today.

Yours very truly,
MRS. JOLINE B. WILLIAMS, CLERK

68930. BISHOP v. INTERNATIONAL PAPER COMPANY et al.

CARLEY, Judge.

Appellant-plaintiff is an attorney. He was engaged to perform certain legal services for appellee-defendant International Paper Company (International). Subsequently, International discharged appellant and retained the legal services of other attorneys, who are the remaining appellee-defendants. A dispute arose concerning the amount of compensation that International owed appellant. This dispute resulted in International's filing an action against appellant in federal court. Appellant, in turn, filed an action against appellees in the Superior Court of Fulton County.

Thereafter, appellees mailed a proposed "Settlement Agreement and General Release" to appellant. Under the terms of the proposed agreement, appellant would receive the sum of $100,000 and the federal suit against him would be dismissed with prejudice, in consideration for which appellant would dismiss his state action with prejudice. Additionally, under the terms of the proposal, appellant would agree to release and forever discharge appellees "from any and all claims, demands, actions, causes of action, damages and suits at law and equity of whatsoever kind, arising in any way whatsoever, directly or indirectly, from the matters described in this 'Settlement Agreement and General Release,' the afore described suits and litigation and all other claims of any kind whatsoever whether or not related to the aforesaid matters, suits, and litigation, it being the intention of the parties that their rights be limited to the provisions of this agreement." The proposal also contained appellees' similar agreement to release and forever discharge appellant. Finally, the proposal contained a provision that the parties would "agree and covenant that the terms of this Agreement shall dispose of any and all obligations and rights which may be deemed to have existed in regard to the matters, claims, suits and litigations described herein and all other claims of any kind whatsoever whether or not related to the aforesaid matters, claims, suits and litigation that existed prior to the execution of this Agreement. . . ."

When the proposed "Settlement Agreement and General Release" was sent to appellant, it already bore the notarized signature of each of the appellees. The agreement indicated that each appellee had affixed his respective signature over a period of time encompassing the latter part of October 1982 and the early part of November 1982. Appellant signed the agreement on December 27, 1982. A check for $100,000, dated December 28, 1982, and made payable to appellant, was delivered. The face of this check provided that it was "[f]or settlement of all claims by [appellant] against [appellees] as detailed in Settlement Agreement and General Release signed by [appellant] on December 27, 1982, and signed by other parties." Appellant negotiated the check. As provided in the agreement, the two pending lawsuits were then dismissed with prejudice.

However, in March of 1983, appellant instituted the instant lawsuit against appellees. The first six counts of appellant's instant complaint constituted the same allegations that had been made in the previous action that appellant had dismissed with prejudice. The seventh and final count was an allegation that appellant had been libeled. The alleged libel was contained in a letter dated December 8, 1982, addressed to four individuals and signed by one of the appellees. The subject of the letter was an affidavit that appellant had filed in the then-pending litigation between the parties, in which affidavit appellant had made certain assertions concerning the four individuals to whom the letter was addressed. The gist of the letter was to inform the four addressees that appellant's affidavit had put their actions "in issue" in the then-pending litigation, with the result that deposing them would be necessary. The alleged libel in the letter was the following sentence: "We of course reject any suggestion that the contents of [appellant's] scandalous affidavit even remotely relates to the truth."

Appellees answered appellant's complaint, raising by way of defense the previous settlement agreement and the dismissal of the previous litigation. Appellees' subsequent motion for summary judgment was granted and appellant appeals.

1. It is clear that summary judgment was properly

granted as to the first six counts of appellant's complaint. Those counts merely realleged the same claims against appellees which were raised in the previous action that appellant dismissed with prejudice. A dismissal with prejudice "means that the same plaintiff cannot again sue [the] same defendant[s] on [the] same cause[s] of action." *Rowland v. Vickers*, 233 Ga. 67, 68 (209 SE2d 592) (1974). "A dismissal with prejudice *operates* as an adjudication on the merits. It is a final disposition. It bars the right to bring another action on the same claim or cause. [Cit.]" (Emphasis in original.) *Marchman & Sons, Inc. v. Nelson*, 251 Ga. 475, 477 (306 SE2d 290) (1983); *Coleman v. State Farm Mut. Auto. Ins. Co.*, 104 Ga. App. 328 (121 SE2d 833) (1961).

Moreover, under the express and unambiguous terms of the "Settlement Agreement and General Release," appellees were to be released and discharged from any liability to appellant with regard to those six claims upon payment of $100,000 to appellant. It is undisputed that appellant executed the agreement and received the contemplated consideration. "[P]ayment of the full amount of consideration in accordance with the terms of a contract of release extinguishes the releasor's cause of action. [Cit.]" *Service Fire Ins. Co. v. Ledbetter*, 112 Ga. App. 333 (1) (145 SE2d 97) (1965).

The record also demonstrates that appellant has made no tender back to appellees of the $100,000 that he received as consideration under the agreement. For this additional reason, he is barred from reasserting the claims encompassed in the first six counts of his instant complaint. See *Mack v. Shearer*, 222 Ga. 33 (148 SE2d 314) (1970).

Accordingly, summary judgment was properly granted to appellees as to the first six counts of appellant's complaint. Appellant's arguments to the contrary are unavailing and warrant no further discussion.

2. The only issue remaining is whether the summary judgment was properly granted as to the libel count. In this regard, the record clearly demonstrates that the communication was privileged. "An attorney at law has a conditional privilege to make, during the progress of a trial, such fair comments on the circumstances of the case and the conduct

of the parties in connection therewith as in his judgment seem proper." *Atlanta News Publishing Co. v. Medlock,* 123 Ga. 714 (5) (51 SE 756) (1905). The record demonstrates that, pursuant to the holding of *Sherwood v. Boshears,* 157 Ga. App. 542 (278 SE2d 124) (1981), summary judgment was properly granted as to the libel count.

Moreover, it is clear that this purported libel claim arose, directly or indirectly, from the then-pending litigation and that it was in existence at the time appellant executed the agreement. Accordingly, the libel claim was encompassed under the clear and unambiguous terms of the release agreement. "'A release may be avoided where the releasor can show that it was executed for mutual mistake . . . *unless* it further appears that the parties intended that claims for all injuries, whether known or unknown at the time of the execution of the release, be relinquished.' [Cit.]" (Emphasis supplied.) *Kennedy v. Bateman,* 217 Ga. 458, 461 (123 SE2d 656) (1961). The parties to the agreement in the instant case "clearly anticipated that other injuries might show up later when they recited in the release that the [appellees] were being released and forever discharged 'from all . . . suits . . . claims and demands whatsoever . . .'" arising from the underlying litigation (*James v. Tarply,* 209 Ga. 421, 423 (73 SE2d 188) (1952)), and that the agreement would "dispose of any and all obligations and rights which may be deemed to have existed in regard to" the litigation, as well as "all other claims of any kind whatsoever whether or not related to the . . . litigation that existed prior to the execution of" the agreement. Accordingly, the purported libel claim was covered by the all-inclusive settlement and release agreement. As to the seventh count of appellant's complaint, summary judgment was properly granted to appellees.

3. It is our determination that the instant direct appeal from a non-money judgment is frivolous. Accordingly, pursuant to Rule 26(b) of this court, we impose, on our own motion, a penalty of $500 against appellant.

Judgment affirmed with direction. Birdsong, P.J., and Beasley, J., concur.

SUPREME COURT OF GEORGIA

ATLANTA, February 21, 1985

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

41894: WINFORD KENT BISHOP v.
INTERNATIONAL PAPER CO., et al.

Upon consideration of the Motion for Imposition of Further Penalty under Rule 14, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Hazel E. Hallford
DEPUTY CLERK

SUPREME COURT OF GEORGIA

ATLANTA, February 21, 1985

The Honorable Supreme Court met pursuant to adjournment.

By Marshall, P.J.
The following direction was given:

41894: WINFORD KENT BISHOP v.
INTERNATIONAL PAPER CO., et al.

Upon consideration of the motion for a stay of this court's remittitur in order that an appeal or an application for certiorari may be filed in the Supreme Court of the United States to obtain a review of this court's judgment rendered in this case on 1-25-85, such motion is hereby granted, subject to the following conditions:

(1) The clerk of this court is directed to withhold the transmittal of such remittitur to the trial court for ninety days from the date of this court's judgment.

(2) The clerk of this court is directed to transmit such remittitur to the trial court not later than the ninety-fifth day from the date of this court's judgment, provided that the clerk shall continue to withhold the transmittal of such remittitur if the clerk is notified in writing that an appeal or application for certiorari has been timely filed in the Supreme Court of the United States. Upon the timely filing of such appeal or application in the Supreme Court of the United States, the clerk is directed to withhold the transmittal of such remittitur until the final disposition of the case by that Court.

/s/ Thomas O. Marshall
PRESIDING JUSTICE

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

Witness my signature and the seal of said court hereto affixed the day and year last above written.

CLERK

COURT OF APPEALS
OF THE
STATE OF GEORGIA

ATLANTA, January 29, 1985

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

68930: WINFORD KENT BISHOP v.
INTERNATIONAL PAPER CO., et al. (C-97539)

Due to a clerical error the Notice of Intention to file Certoriari was inadvertently docketed on the date received (December 26, 1984) instead of the certified date (December 20, 1984). It is hereby ordered that the filing date be amended to reflect December 20, 1984, as the date of filing.

COURT OF APPEALS OF THE STATE OF GEORGIA
Clerk's Office, Atlanta
January 29, 1985

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Alton Hawk
CLERK

IN THE
SUPERIOR COURT
FOR THE COUNTY OF FULTON
STATE OF GEORGIA

WINFORD KENT BISHOP, Plaintiff

Civil Action

vs.

File No. C-97539

INTERNATIONAL PAPER COMPANY,
JEFFREY M. SMITH, CHARLES MYNEDER, and
BEN R. SWANK, JR., Defendants

ORDER

The above-styled matter came before this Court on January 13, 1984 for a hearing on Defendants' Motion for Summary Judgment.

After having heard oral argument from counsel for Defendants and from Plaintiff, proceeding *pro se*, and after thorough review of the motion, the briefs and affidavits in support thereof and in opposition thereto, as well as the entire file of record, the Court hereby grants the motion and dismisses Plaintiff's Complaint with prejudice.

IT IS SO ORDERED.

This_____2_____day of February, 1984.

/s/ SAM PHILLIPS McKENZIE
JUDGE, SUPERIOR COURT
ATLANTA JUDICIAL CIRCUIT

CONSTITUTION OF THE UNITED STATES

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise therof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

GEORGIA CONSTITUTION

Art. 6, §1, ¶1
Paragraph I. Judicial power of the state.

The judicial power of the state shall be vested exclusively in the following classes of courts: magistrate courts, probate courts, juvenile courts, state courts, superior courts, Court of Appeals, and Supreme Court. Magistrate courts, probate courts, juvenile courts, and state courts shall be courts of limited jurisdiction. In addition, the General Assembly may establish or authorize the establishment of municipal courts and may authorize administrative agencies to exercise quasi-judicial powers. Municipal courts shall have jurisdiction over ordinance violations and such other jurisdiction as provided by law. Except as provided in this paragraph and in Section X, municipal courts, county recorder's courts and civil courts in existence on June 30, 1983, and administrative agencies shall not be subject to the provisions of this article.

Art. 6, §5, ¶3
Paragraph III. Jurisdiction of Court of Appeals; decisions binding.

The Court of Appeals shall be a court of review and shall exercise appellate and certiorari jurisdiction in all cases not reserved to the Supreme Court or conferred on other courts by law. The decisions of the Court of Appeals insofar as not in conflict with those of the Supreme Court shall bind all courts except the Supreme Court as precedents.

Art. 6, §6, ¶2
Paragraph II. Exclusive appellate jurisdiction of Supreme Court.

The Supreme Court shall be a court of review and shall exercise exclusive appellate jurisdiction in the following cases:

(1) All cases involving the construction of a treaty or of the Constitution of the State of Georgia or of the United

States and all cases in which the constitutionality of a law, ordinance, or constitutional provision has been drawn in question; and

(2) All cases of election contest.

Art. 6, §6, ¶3

Paragraph III. General appellate jurisdiction of Supreme Court.

Unless otherwise provided by law, the Supreme Court shall have appellate jurisdiction of the following classes of cases:

(1) Cases involving title to land;
(2) All equity cases;
(3) All cases involving wills;
(4) All habeas corpus cases;
(5) All cases involving extraordinary remedies;
(6) All divorce and alimony cases;
(7) All cases certified to it by the Court of Appeals; and
(8) All cases in which a sentence of death was imposed or could be imposed.

Review of all cases shall be as provided by law.

Art. 6, §6, ¶5

Paragraph V. Review of cases in Court of Appeals.

The Supreme Court may review by certiorari cases in the Court of Appeals which are of gravity or great public importance.

OCGA

5-3-31. Damages assessed for frivolous appeals.

If upon the trial of any appeal it shall appear to the jury that the appeal was frivolous and intended for delay only, they shall assess damages against the appellant and his security, if any, in favor of the appellee for such delay, not exceeding 25 percent on the principal sum which they shall find due, which damages shall be specially noted in their verdict. (Laws 1799, Cobb's 1851 Digest, p. 495; Code 1863, §3552; Code 1868, §3575; Ga.L. 1868, p. 132, §2; Code 1873, §3631; Code 1882, §3631; Civil Code 1895,

§4473; Civil Code 1910, §5018; Code 1933, §6-602; Ga. L. 1983, p. 884, §3-2.)

5-4-18. Recovery of damages for frivolous certiorari.

If it shall be made to appear that a certiorari was frivolous and was applied for without good cause or only for the purpose of delay, the presiding judge before whom the writ was heard, on motion of the opposite party, may order that damages totaling not more than 20 percent of the sum adjudged to be due be recovered by the defendant in certiorari against the plaintiff in certiorari and his security; and judgment may be entered and execution issued accordingly. (Ga. L. 1857, p. 104, §2; Code 1863, §3976; Code 1868, §3997; Code 1873, §4069; Code 1882, . . .

COPY MISSING ???

5-6-6. Damages for frivolous appeal.

When in the opinion of the court the case was taken up for delay only, 10 percent damages may be awarded by the appellate court upon any judgment for a sum certain which has been affirmed. The award shall be entered in the remittitur. (Laws 1845, Cobb's 1851 Digest, p. 450; Code 1863, §4182; Code 1868, §4221; Code 1873, §4286; Code 1882, §4286; Civil Code 1895, §5594; Civil Code 1910, §6213; Code 1933, §6-1801.)

15-2-8. Powers of court, generally.

The Supreme Court has authority:

(1) To exercies appellate jurisdiction, and in no appellate case to hear facts or examine witnesses;

(2) To hear and determine all cases, civil and criminal, that may come before it; to grant judgments of affirmance or reversal, or any other order, direction, or decree required therein; and, if necessary, to make a final disposition of a case in the manner prescribed elsewhere in this Code;

(3) To grant any writ necessary to carry out any purpose of its organization or to compel any inferior tribunal or of-

ficers thereof to obey its order;

(4) To appoint its own officers and to commission any person to execute any specific order it may make;

(5) To establish, amend, and alter its own rules of practice and to regulate the admission of attorneys to the practice of law;

(6) To punish for contempt by the infliction of a fine as high as $500.000 or imprisonment not exceeding ten days, or both; and

(7) To exercise such other powers, not contrary to the Constitution of this state, as given to it by law. This paragraph shall not be interpreted to abrogate the inherent power of the court. (Laws 1845, Cobb's 1851 Digest, pp. 450, 452; Code 1863, §§211, 4180; Code 1868, §§205, 4219; Code 1873, §§218, 4284; Code 1882, §§218, 4284; Civil Code 1895, §5498; Penal Code 1895, §1068; Civil Code 1910, §6103; Penal Code 1910, §1095; Code 1933, §24-3901.)

15-2-17. Rules for regulating Supreme Court's proceedings.

The Supreme Court shall have full power and authority to make all rules, not in conflict with the Constitution or laws of this state, as may be necessary for carrying the Constitution into effect and regulating the court's proceedings thereunder. To these ends it may, by rules, provide and declare when the court shall sit in a body and when in separate divisions, how its minutes shall be kept, how the cases upon its dockets shall be apportioned and divided between the divisions, at what times and to what extent changes shall be made in the personnel thereof; and it generally may make all regulations as to practice and procedure which experience may show to be convenient and expedient for the proper transaction of its business, with due regard to the rights of the parties and counsel concerned. (Ga. L. 1896, p. 42, §4; Civil Code 1910, §6117; Code 1933, §24-4016.)

15-2-18. Rules of practice and procedure in courts of state; power to prescribe, etc; ratification by General Assembly; assistance of bar committee.

(a) The Supreme Court and the Justices thereof shall have the power to prescribe, modify, and repeal rules of procedure, pleading, and practice in civil actions and proceedings in the courts of this state and of practice and procedure for appeal or review in all cases, civil and criminal, to or from any of the courts or tribunals of this state. The rules shall not abridge, enlarge, or modify the substantice rights of any litigant.

(b) Whenever the Supreme Court adopts or prescribes any rules under this Code section, the rules, shall be reported by the court to the General Assembly at the next regular session thereof or at an extraordinary session authorized by law to consider and ratify them. The rules shall not take effect until they have been ratified and confirmed by the General Assembly by an Act or resolution thereof.

(c) The Supreme Court is authorized to repeal, modify, or amend any rule adopted or prescribed by it, but no repeal, modification, or amendment shall be effective until it has been ratified by an Act or resolution of the General Assembly.

(d) The Supreme Court shall appoint a committee or committees from the bar of this state to aid in the preparation of rules.

(e) This Code section shall not be construed as constituting an abandonment or disclaimer of the power of the General Assembly to enact laws regulating procedure in the courts of this state. (Ga. L. 1945, p. 145, §§1-5.)

RULES OF APPELLATE PROCEDURE

Rule 38. Damages for Delay

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

RULES OF THE SUPREME COURT OF THE STATE OF GEORGIA (Applicable Laws Not Reiterated)

Rule 14.

The court may with or without a motion impose a penalty not to exceed $500.00 against an appellant in any civil case in which there is a direct appeal, application for discretionary appeal, application for interlocutory appeal, petition for certiorari or motion which the court determines to be frivolous. This rule applies only to those cases in which there is no money judgment.

§

RULES OF THE COURT OF APPEALS OF THE STATE OF GEORGIA

Rule 26.(a). No Prosecution and Penalties. Cases Not Prosecuted.

On the call of the case for argument, if the appellant shall not appear, or if appellant be unrepresented by counsel or by brief, the Court shall dismiss the appeal for want of prosecution and it will not be reinstated except for providential cause. If the appellee or appellee's counsel shall appear, such appellee or counsel may move to reopen the record and insist upon an affirmance of the case.

Rule 26.(b). Appeals Deemed Frivolous.

The Court, with or without a motion, may impose a penalty not to exceed $500 against an appellant in any civil case in which there is a direct appeal, application for discretionary appeal, application for interlocutory appeal, or motion which the Court determines to be frivolous. This rule applies only to those cases in which there is no money judgment.

Case No. 68930

IN THE
COURT OF APPEALS
STATE OF GEORGIA

WINFORD KENT BISHOP, Appellant,

versus

INTERNATIONAL PAPER COMPANY,
JEFFREY M. SMITH,
CHARLES MYNEDER, and
BEN R. SWANK, JR., Appellees.

MOTION FOR REHEARING AND FIRST POSSIBLE RESPONSE TO COURT'S OWN MOTION UNDER RULE 26 (b)

WINFORD KENT BISHOP
Counsel for Appellant
1835 First Atlanta Tower
Atlanta, Georgia 30383

DATED: November 26, 1984.

TO THE HONORABLE JUDGES
OF THE
COURT OF APPEALS OF GEORGIA:

GREETINGS:

COMES NOW the appellant and submits his response to the Court's motion reported in Section 3 of the Opinion of November 14, 1984, as Part One and Part Two. For purposes of Rule 28 (a) of the Supreme Court rules, this response may be also deemed a motion for rehearing of Section 3. His motion for rehearing of Sections 1 and 2 of the Opinion is set forth hereinafter as Part Three.

PART ONE:

RESPONSE TO SECTION 3 OF OPINION

I.

APPLICATION OF RULE 26 (b) TO THE FACTS OF THIS CASE:

A.

DEPRIVES APPELLANT OF PROPERTY WITHOUT DUE PROCESS OF LAW UNDER FOURTEENTH AMENDMENT OF U.S. CONSTITUTION

The Fourteenth Amendment of the United States Constitution provides in part as follows in Section 1:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. ***"

The Court of Appeals of Georgia is an official arm of the State. Constitution of the State of Georgia (1983), Article VI, Section I, Paragraph I; Section V, Paragraph III. Appellant was deprived of due process of law on or about November 14, 1984, because Rule 26 (b) was not published until May 15, 1984, four days after appellant's direct appeal was docketed in the Court of Appeals, and more than two months after appellant made an informed decision to appeal a February 2, 1984 order of the Superior Court of Fulton County to the Court of Appeals. Affidavit, November 26, 1984, paragraph 15, at page 27, *infra* (hereinafter "Affidavit ¶___at___."). Appellant's decision to appeal the trial court order was a close one; and despite his belief that he would ultimately prevail in the Supreme Court of Georgia, appellant would not have appealed to the Court of Appeals had he known that Rule 26 (b) would be enacted and then applied to his case retroactively. Affidavit ¶ 18 at 28.

Moreover, although Rule 26 (b) was promulgated and published while appellant's appeal was pending in this Court, the Court did not advise appellant personally or by United States First Class Mail of the promulgation and publication, nor of the fact that it could be applied to him. In fact, Appellant did not know about the rule until November 16, 1984. Affidavid ¶ 17 at 28.

Finally, Rule 26 (b) is void for vagueness as no procedure is provided for contesting its imposition by the Court, nor is any standard given in the published notice for determining its effective date.

The most recent decision of the Supreme Court of the United States on the issue of the requirements of notice under the Due Process Clause is *Mennonite Board of Missions v. Adams, –U.S.–, 77 L.E.2d 180, 103 S.Ct. – (1983), in which the Court held that publication in a legal newspaper and posting on real property was an inadequate notice to a mortgagee of a tax sale of the property in which it had an interest. The dissent of Justice O'Connor, in which Justices Powell and Rehnquist joined, interpreted the holding as follows:*

> "*The Court now hold that whenever* a party has a legally protected property interest, '[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests . . . if [the party's] name and address are reasonably ascertainable.'" 77 L.E.2d at 190.

Appellant's name and address were certainly available to the Court on May 11, 1984, when the appeal was docketed, for appellant received notice thereof from the clerk dated May 11, 1984. Affidavit ¶ 14 at 27.

B.

APPLICATION OF RULE 26 (b) TO THE FACTS OF THIS CASE DEPRIVES APPELLANT OF EQUAL PROTECTION OF LAWS UNDER THE FOURTEENTH AMENDMENT

Section 1 of the Fourteenth Amendment of the United States Constitution also provides in part, as follows:

> "[N]or [shall any State] deny to any person within its jurisdiction the equal protection of the laws."

Rule 26 (b) violates appellant's right to equal protection of the laws because it established two classes of cases, treats members of one class differently from those in the other class, and suggests no rational judicial purpose furthered by the discrimination against the disfavored class. The two classes are the following:

Class One: One class is composed of appellants in civil cases in which there is a direct appeal and in which there is no money judgment.

Class Two: A second class is composed of appellants in civil cases in which there is a direct appeal and in which there is a money judgment.

By definition: The issues raised by appellants in both cases are frivolous. Yet, in Class One, Appellant One can be assessed a penalty of $500, but in Class Two, Appellant Two cannot be assessed a penalty.

To test whether the discrimination is rational, the following may be considered: A matter coming to the Court of Appeals from a money judgment would have gone to trial (unless there is a confession of judgment) and the issues on appeal would include questions as to the weight and sufficiency of the evidence (as on a directed verdict) or as to evidentiary rulings or jury instructions (as on a motion for judgment notwithstanding the verdict). The scope of judicial review would be substantial in Class Two because there would likely be a transcript. There would probably be more judicial effort expended in reviewing this type of record, than in a non-money, or Class One case. If the purpose of Rule 26 (b) is to cut down on frivolous appeals in order to reduce or make more manageable the court's workload, the classification makes no sense. Nevertheless, Appellant Two could not be hit with a penalty.

A more subtle discrimination is exemplified by the present appeal. Critical issues are (a) whether the so-called "Settlement Agreement and General Release" (hereinafter "the accord") is an ordinary contract or is an executory accord (*Taylor v. Central of Georgia Ry. Co.*, 99 Ga. App. 224 (1959)) and (b) whether the subsequent libel of December 8, 1982, could inherently be included within its terms. The record on appeal shows that appellees filed counterclaims below alleging breach of contract on account of the filing of the complaint below. If the accord is an ordinary contract and if the December 8, 1982 libel is embraced within it, there is a litigation risk that the filing of the action would be deemed a breach. As such, the only issue might be damages. If appellant is restrained from appealing a summary judgment that dismisses his complaint with prejudice, he might well lose on appellees' second motion for summary judgment on their counterclaims. Thus, if appellant wants to avoid the risk of a $500 penalty, his right to appeal is limited to appealing a money judgment against him after a trial court determination of the critical issues of liability and after a jury trial limited solely to the issue of damages. Therefore, appellant would only be able to file a frivolous appeal as to damages only, but not a frivolous appeal as to liability and damages, as Appellant Two in Class Two. This is an irrational distinction and serves no rational purpose.

This subtle discrimination is not merely hypothetical. The trial court entered summary judgment for on September 20, 1984, for appellees on their counterclaims for breach of contract, and appellant's appeal was docketed in this Court as Case No. 69962 on November 21, 1984.

Appellant has had insufficient time to research this important constitutional issue. For a case in which the Georgia Supreme Court held a statute of the General Assembly unconstitutional for violating the Fourteenth Amendment's proscription against laws which deprive a person of the equal protection of the laws, see *Commercial Surety Co. v. Lee*, 148 Ga. 597 (97 S.E. 516) (1918). Appellant's search for additional authority will continue. The Court will be notified by letter of additional authority.

C.

APPLICATION OF RULE 26 (b) TO THE FACTS OF THIS CASE DEPRIVES APPELLANT OF DUE PROCESS OF LAW UNDER THE 1983 CONSTITUTION

Article I, Section 1, Paragraph I of the 1983 Constitution of the State of Georgia provides as follows:

> "No person shall be deprived of life, liberty, or property except by due process of law."

In *Norman v. State*, 171 Ga. 527 (1930), a criminal defendant appealed to the Supreme Court on the ground that erroneous rulings by the trial court had deprived him of due process of law under the State Constitution then in effect. The Court noted: "There is no contention that any law enforced by the court was violative of the fundamental principles of private right. It is not contended that the court . . . was proceeding without notice and a hearing." 171 Ga. at 529. The court then found it lacked appellate jurisdiction and transferred the case to the Court of Appeals. By contrast, appellant does directly claim lack of notice and a violation of fundamental right.

D.

APPLICATION OF RULE 26 (b) TO THE FACTS OF THIS CASE DEPRIVES APPELLANT OF THE EQUAL PROTECTION OF THE LAWS UNDER THE 1983 CONSTITUTION

Article I, Section 1, Paragraph II, provides as follows:

> "Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws."

Hughes v. Reynolds, 223 Ga. 727 (157 S.E.2d 746) (1967), ruled a statute unconstitutional under the mandate.

II.

PROCEDURE REQUIRED OF COURT OF APPEALS AT THIS POINT IN APPELLATE PROCEEDINGS

A.

DETERMINE WHETHER THERE IS A SUBSTANTIAL CONSTITUTIONAL QUESTION RAISED AS TO APPLICATION OF RULE 26 (b); AND, IF SO, CERTIFY QUESTION TO SUPREME COURT OF GEORGIA

The 1983 Constitution provides in Article VI, Section VI, Paragraph II, as follows:

> "The Supreme Court shall be a court of review and shall exercise exclusive appellate jurisdiction in the following cases:
>
> (1) All cases involving the construction of a treaty or of the Constitution of the State of Georgia or of the United States and *all cases in which the constitutionality of a law, ordinance,* or constitutional provision *has been drawn in question;"* *** *[Emphasis added.]*

The Supreme Court has provided that it is the construction of laws which engages the court's exclusive jurisdiction, not the mere application of well settled constitutional norms to fact or law. Norman v. State, 171 Ga. 527 (1930). The instant matter is of first impression. There is no established precedent of the Supreme Court in this state to which this Court can look. Therefore, the Court should certify the case to the Supreme Court for a ruling. Certification is, of course, permitted in the 1983 Constitution at Article VI, Section VI, Paragraph IV; Article VI, Section V, Paragraph IV and Article VI, Section V, Paragraph IV.

B.

PROCEDURE REQUIRED OF COURT OF APPEALS AT THIS POINT IN APPELLATE PROCEEDINGS: CONSIDER APPELLANT'S EVIDENCE IN SUPPORT OF HIS RESPONSE SUBMITTED BY AFFIDAVIT IN PART TWO HEREOF

Appellant has found no case in which the Court of Appeals has entered a penalty against an appellant or his counsel for filing an allegedly frivolous appeal. Therefore, the decision is a surprise. It could not have been reasonably anticipated at the date the notice of appeal was filed on March 2, 1984. Nor could it have been anticipated at the time the appeal was docketed in this Court on May 11, 1984. Published notice of its promulgation was not received until May 15, 1984. Affidavit ¶14 at 27.

The only analogy appellant can find is where an appellant is cited for a constructive, civil contempt of court. That is, a contempt not in the presence of the court or so near thereto as to obstruct the administration of justice. In such cases, the court issues a rule nisi which is served on appellant, giving him notice of the charges against him, and an opportunity to defend and to be heard. *Anthony v. Anthony,* 240 Ga. 155 (240 S.E.2d 45) (1977).

This Court has held that the opportunity for a hearing in such a case must be more than evanescent. *Maples v. Seeliger,* 165 Ga. App. 201 (299 S.E.2d 906) (1983); cf. *Dowdy v. Palmour,* 164 Ga. App. 804 (298 S.E.2d 521) (1982).

Appellant also wants the right to subpoena witnesses to demonstrate that appellees' comments about his November 23, 1982 affidavit were not fair commentary. Cf. *Mathews v. Mathews,* 222 Ga. 311 (149 S.E.2d 666) (1966). The Court might be agreeable. *Beall v. Beall,* 167 Ga. 447 (145 S.E.2d 878) (1928).

A Contemnor has right to respond under oath to a contempt citation, and the Court is obliged to consider it as evidence. *Harris v. Lamar,* 102 Ga. 154 (29 S.E. 162) (1897). Appellant wants no less. Accordingly, he encloses his affidavit in response to the Court's *sua sponte* application of Rule 26(b), proffers it for consideration, and incorporates it herein by reference.

III.

COURT OF APPEALS LACKS POWER TO ENACT RULE 26 (b) BECAUSE

A.

1983 CONSTITUTION DOES NOT CONFER RULE-MAKING POWER ON COURT

The 1976 Constitution of the State, effective until June 30, 1983, provided in part as follows in Article VI, Section II, Paragraph VIII:

> "*** "*The laws relating to the Supreme Court as to . . . the powers, practice, procedure,* times of sitting, and costs of the Court, the publication of reports of cases decided therein, and in all other respects, except as otherwise provided in this Constitution or by the laws as to the Court of Appeals on the effective date of this Constitution, *and until otherwise provided by law, shall apply to the Court of Appeals* so far as they can be made to apply." *** [Emphasis added.]

Apparently, this provision was of long duration, for in *Raybestos-Manhattan, Inc. v. Moran,* 248 Ga. 461 (284 S.E.2d 256) (1981) (a case in which this appellant was serving as counsel), the Supreme Court observed: "When the Court of Appeals was established in 1906 by constitutional amendment, it was provided that the 'laws relating to the Supreme Court as to . . . the powers, practices, procedure, times of sitting and costs of the court . . . shall apply to the Court of Appeals. . . .' " 248 Ga. at 462. While the 1976 Constitution was in effect this Court said: "Further, the rule-making power of this court is the same as that of the Supreme Court." *Justice v. Dunbar,* 152 Ga. App. 831 at 832 (264 S.E.2d 301) (1979).

The 1976 Constitution is repealed. The 1983 Constitution does not explicitly grant rule-making power to either appellate court.

B.

COURT OF APPEALS LACKS POWER TO ENACT RULE 26 (b) BECAUSE INHERENT POWER OF COURT IS LIMITED TO PROCEDURAL MATTERS

The Court of Appeals is a constitutional court. 1983 Constitution, Article VI, Section V. It has inherent power to establish rules of practice before it. *Chapman v. Gray,* 8 Ga. 337 (2) (1850) (dictum).

The proper scope of its rules is gleaned by a review of their latest codification published in Volume 34, No. 32 of *Georgia Law Reporter* (Harrison, August 6, 1981), designated 158 Ga. App. 430-506. The report states that the rules were adopted February 23, 1981, *to be effective over six months later,* on September 1, 1981. These rules were promulgated while the 1976 Constitution was in effect. The first amendment to these rules since enactment is Rule 26 (b). It appears on the cover of Volume 37, No. 18 of *Georgia Law Reporter* (Harrison, May 3, 1984), designated 169 Ga. App. 424-490, and states that it was adopted April 4, 1984. The Court does not state an effective date. The volume is dated May 3, 1984, and notes that: "Second class postage paid at Norcross, Ga." Affidavit ¶ 15 at 27.

A comparison of the subject matter of the rules contained in the 1981 codification with Rule 26 (b) shows a substantial difference. For example, the 1981 rules state where briefs are to be filed (Rule [R]-1), how oral argument may be presented (R-8), who may be admitted to practice before it (R-9), how briefs are to be prepared (R-11), how the court may be divided into divisions (R-1[illegible]), how a case is docketed (R-21), how to enumerate errors (R-27), how to seek extension of time for filing notice of appeal (R-28), what interlocutory orders may be reviewed on interlocutory appeal (R-29), how mandamus shall be docketed (R-31), how motions are to be filed (R-32), how to organize a notice of appeal (R-33), how court papers may be removed (R-34), what form opinions may take (R-35), what happens when a party to an appeal dies (R-39), what matters the court may review on petition to appeal (R-40), what duties are incumbent on trial court clerks (R-41), on what basis rehearings may be granted (R-48), how a remittitur is transmitted (R-49), and what the rules are as to supersedeas (R-50). Rule 7 provides that, "Breach of any of the rules of this Court subjects the offender to contempt and revocation of license to practice in the Court of Appeals." But appellant has not found a case in which a lawyer was disbarred for breaking these rules. Not one of these rules gives an appellee a substantive right of action to a penalty on an appeal, especially in respect of an allegedly frivolous appeal. For example, Rule 6 implies there is no penalty for inclusion of frivolous issues. What happens is that they "tend [ ] to obscure critical issues" in the case.

Rule 17 limits costs in all cases to $30 and provides that attorneys are liable for the costs. Rule 26 (presumably 26 [a]) provides that at the call of the case, if appellant does not appear, "the Court shall dismiss the appeal." It provides that "If the appellee or appellee's counsel shall appear, such appellee or counsel may move to reopen the record and insist upon an affirmance of the case and an assessment of 10% damages for delay." Ten percent of what is not specified; and in a non-money case it is not clear what the "what" could be, except for the $30 costs. The purpose of the rule appears simply to assure that appellant or counsel is present at the call of oral argument. However, the rule is facially in conflict with Rule 8 (g) that, "Unless expressly ordered by the Court, oral argument is never mandatory and argument may be submitted by briefs only." Appellant did not find a case in which appellee reopened an appeal, moved for assessment of 10% damages for delay, and was awarded same.

By contrast, Rule 26 (b) gives to an appellee a right to seek and receive a payment of up to $500 from an appellant if the Court of Appeals determines the appeal to be frivolous. No standard is given for determining the amount of the penalty. This right is out of character with the 1981 rules. It is a difference in kind and not of degree. It is a substantive right and not a directive of procedure.

C.

COURT OF APPEALS LACKS POWER TO ENACT RULE 26 (b) BECAUSE ANALOGY TO SUPREME COURT'S AUTHORITY TO ADOPT RULE 14 IS INAPPROPRIATE

The Supreme Court's previous rules were adopted prior to June 21, 1979, to be *effective more than 30 days later* on August 1, 1979. Rule 14 was reserved. *Georgia Law Reporter* (Harrison, June 21, 1979), Volume 32, No. 25, designated 243 Ga. 528-580. These rules were first amended by a rewritten Rule 31 requiring a motion for rehearing in the Court of Appeals prior to filing a petition for a writ of certiorari in the Supreme Court. *Georgia Law Reporter* (Harrison, May 28, 1981), Volume 34, No. 22, designated 247 Ga. 375-463. Interestingly, this rule which added a procedural step to obtaining a discretionary appellate review in Georgia was made *effective more than three months later* on September 1, 1981. The rules were amended again by promulgation of Rule 14, being identical to Rule 26 (b) except that Rule 14 includes a petition for certiorari. *Georgia Law Reporter* (Harrison, April 26, 1984), Volume 37, No. 17, designated 252 Ga. 201-263. Like Rule 26 (b), no effective date is prescribed in the published notice. The Supreme Court adopted its current rules effective July 1, 1984. *Georgia Law Reporter* (Harrison, May 24, 1984), Volume 37, No. 21, designated 252 Ga. 333-395. Presumably, reenactment of all Supreme Court rules on July 1, 1984, will give lawyers more notice of Rule 14, and fewer will run afoul of it. Thus, the same type notice issue as in this case is not likely to arise in the Supreme Court.

While the Supreme Court has the inherent power to enact rules of practice, *Chapman v. Gray*, 8 Ga. 337 (1850), the Supreme Court also has statutory authority to enact rules. OCGA § 15-2-8 provides in part as follows:

> "The Supreme Court has authority:
>
> * * *
>
> "(5) To establish, amend, and alter its own rules of practice and to regulate the admission of attorneys to the practice of law;

> "(6) To punish for contempt by the infliction of a fine as high as $500.00 or imprisonment not exceeding ten days, or both;
>
> * * *
>
> "This paragraph shall not be interpreted to abrogate the inherent power of the court."

While appellant has not had an opportunity to research this point, he believes that common law contempt was ended when the contemnor purged his contempt. Thus, the authority afforded the Supreme Court in OCGA § 15-2-8(6) is greater than the Court would enjoy at common law. Similarly, subsection 5 might seem to grant greater authority than what the inherent power of the court would permit.

Also relevant to the Supreme Court's rule-making power is OCGA § 15-2-17:

> "The Supreme Court shall have full power and authority to make all rules, *not in conflict with the Constitution or laws of this state,* as may be necessary for carrying the Constitution into effect and regulating the court's proceedings thereunder. To these ends it may, by rules, provide and declare when the court shall sit in a body and when in separate divisions, how its minutes shall be kept, how the cases upon its dockets shall be apportioned and divided between the divisions, at what times and to what extent changes shall be made in the personnel thereof; and it generally may make all regulations as to practice and procedure which experience may show to be convenient and expedient for the proper transaction of its business, *with due regard to the rights of the parties and counsel concerned.*" [Emphasis added.]

For the General Assembly to single out "the right of the parties and counsel concerned" in cases before it, in juxtaposition to the relatively innocuous matters listed, indicates that the legislature did not by this statute expand the inherent power of the court. Appellant understands that the reference in line 3 of the statute to the "laws of this state" include the Fourteenth Amendment of the United States Constitution, under the Supremacy Clause thereof.

Another statutory provision applicable to the Supreme Court's rule-making power is OCGA § 15-2-18:

> "(a) The Supreme Court and the Justices thereof shall have the power to prescribe, modify, and repeal *rules* of procedure, pleading, and practice in civil actions and proceedings in the courts of this state and *of practice and procedure for appeal* or review in all cases, civil and criminal, to or *from any of the courts* or tribunals of this state. *The rules shall not abridge, enlarge, or modify the substantive rights of any litigant.*
>
> "(b) Whenever the Supreme Court adopts or prescribes any rules under this Code section, *the rules shall be reported by the court to the General Assembly* at the next regular session thereof or at an extraordinary session authorized by law to consider and ratify them. *The rules shall not take effect until they have been ratified and confirmed by the General Assembly by an Act or resolution thereof.*
>
> * * *
>
> (e) *This Code section shall not be considered* as constituting an *abandonment or disclaimer of the power of the General Assembly* to enact laws regulating procedure in the court of this state." [Emphasis added.]

This statute regulates the Supreme Court's power to make rules. In any case in which the Supreme Court should impose a Rule 14 penalty, the issue would be: Has the Court abridged the substantive rights of the appellant? Has the Court enlarged the substantive rights of any litigant?

The Thanksgiving holiday has not furnished appellant with enough time to research whether Rule 14 was ratified and confirmed by the General Assembly. Appellant presumes it was so ratified and confirmed. This fact alone, however, does not mean that the Court of Appeals' virtually identical Rule 26 (b) is valid. The reason is that this Court's inherent power to establish rules of practice is more limited than the Supreme Court's authority as the Court of Appeals does not have statutory authority to do so. And a legislative ratification of an entire set of Rules of the Supreme Court is no substitute for a judicial examination whether any new rule abridges or modifies the substantive rights of an appellant. Also, the General Assembly could not have given "due regard to the rights of" this appellant as this is a judicial function. Only a Court could do that.

PART TWO:

AFFIDAVIT OF APPELLANT SWORN NOVEMBER 26, 1984, IN SUPPORT OF INSTANT RESPONSE TO SECTION 3 OF OPINION OF NOVEMBER 14, 1983

Case No. 68930

IN THE
COURT OF APPEALS
STATE OF GEORGIA

WINFORD KENT BISHOP, Appellant,

versus

INTERNATIONAL PAPER COMPANY,
JEFFREY M. SMITH,
CHARLES MYNEDER, and
BEN R. SWANK, JR., Appellees.

AFFIDAVIT

STATE OF GEORGIA
COUNTY OF FULTON

I, WINFORD KENT BISHOP, being duly sworn, do hereby depose and say, as follows:

1.

I am the appellant in the foregoing appeal. I have personal knowledge of the facts stated herein and am competent to state them.

2.

The Court of Appeals entered an opinion in this appeal on November 14, 1984, which states as follows on page 8, lines 14-17:

> "3. It is our determination that the instant direct appeal from a non-money judgment is frivolous. Accordingly, pursuant to Rule 26 (b) of this court, we impose, on our own motion, a penalty of $500 against appellant."

3.

I was given no notice of the court's motion, nor afforded an opportunity to respond prior to entry of the opinion. The court offered no hearing on the motion.

4.

The Response to Section 3 of the Opinion of November 14, 1984, which precedes this affidavit in this document, is my first possible opportunity to raise substantial constitutional issues pertaining to lack of notice and an opportunity to be heard and to discrimination for being placed in a class which is disfavored for an irrational purpose under the United States Constitution, particularly the Fourteenth Amendment, and the Constitution of the State of Georgia, particularly Article I, Section I, Paragraphs I and II.

5.

In my professional judgment a motion for rehearing in the Court of Appeals is an inadequate procedure to raise said issues. I do not waive such rights as I may possess to seek relief by adequate procedure in another forum. I submit this affidavit in opposition to the court's own motion to impose a penalty, in support of the response thereto and the motion for rehearing.

6.

The order of the Superior Court of Fulton County from which the instant direct appeal was taken states in material part as follows:

> "The above-styled matter came before this Court on January 13, 1984, for a hearing on Defendant's Motion for Summary Judgment.
>
> "After having heard oral argument from counsel for Defendants and from Plaintiff, proceeding *pro se*, and after thorough review of the motion, the briefs and affidavits in support thereof and in opposition thereto, as well as the entire file of record, the Court hereby grants the motion and dismisses Plaintiff's Complaint with prejudice.
>
> "IT IS SO ORDERED.
>
> "This 2nd day of February, 1984."

7.

With no reasons stated for the court's decision, I was in the same position as I had been on January 12, 1983, when I first found out about the December 8, 1982, libel. I commenced another analysis of the facts and law and psychology of the case to determine whether an appeal was wise. My deliberations proceeded generally, as follows:

8.

A first concern was a poissible negative perception by the Court of Appeals of the attack on the integrity of United States Bankruptcy Judge William L. Norton, Jr. in the underlying *Georgia Paneling Supply* litigation. While this attack had been encouraged by International Paper Company and its joint venture partners and was grounded in fact, it was I who had been the advocate and whose case would be on appeal before other judges. Based upon the curious conclusion of the Georgia Paneling Supply litigation (Cf. 616 F.2d 893 with 607 F.2d 117), it is my professional opinion that some judges over-rely on the rebuttable presumption of regularity which attaches to acts of courts and judges. Frankly, I was concerned with sympathy. However, I believed that the following information was sufficiently known in the legal and judicial community in Atlanta that sympathy would not be a problem:

(a) Judge Norton's reappointment for the period December 7, 1983, to March 31, 1984, came up for consideration in late November, 1983. (He had been appointed December 7, 1971, for a six-year term, and reappointed December 7, 1977, for a subsequent six-year term.)

(b) A merit screening panel to evaluate Judge Norton's qualifications to be reappointed for said period was established by the Honorable John C. Godbold, Chief Judge of the United States Court of Appeals for the Eleventh Circuit, and named as members were Hamilton Lokey of Atlanta, Chairman, Dean Ellen R. Jordan of the University of Georgia Law School at Athens, and John T. Laney, III of Columbus. The Court furnished each of these persons with a copy of a brief drafted and filed by me in *Quinault Pacific Corporation v. Barclays American/Business Credit, Inc.*, Case No. 83-8357, United States Court of Appeals for the Eleventh Circuit, entitled as follows:

> "PETITION FOR REHEARING En Banc OF (a) ORDER DENYING PETITION FOR EXTRAORDINARY WRIT TO Inter Alia VACATE ORDERS DENYING REHEARINGS PROCURED BY CONCEALMENT OF PROHIBITED FINANCIAL RELATIONSHIPS INVOLVING BANKRUPTCY JUDGE AND OPPOSING COUNSEL, (b) ORDER DENYING MOTION TO SUPPLEMENT PETITION WITH LATE-FILED 1982 FINANCIAL DISCLOSURE REPORT"

A copy of this brief is enclosed under separate cover with letter motion for leave to file.

(c) John A. Chandler, then president of the Atlanta Bar Association, and a partner of Sutherland, Asbill & Brennan, told me on December 6, 1983, that my name was on a list of persons that the merit screening panel wanted to talk to and to call each member of the committee. I did call each member.

(d) I was told by each member that he/she had read my brief.

(e) I was told that all communications to and from the merit screening panel were confidential.

(f) The following information was learned from sources other than members of the merit screening panel.

(i) Judge Norton was offered reappointment for the period December 7, 1983, to March 31, 1984, on condition that he tender a written, postdated letter of resignation to Chief Judge John C. Godbold effective December 7, 1984. In return for submitting his resignation, Judge Norton was offered an additional reappointment for the period, April 1 to December 7, 1984.

(ii) Judge Norton accepted this offer, and his postdated letter of resignation was accepted at the time of his reappointment for the short period, December 7, 1983, to March 31, 1984.

(iii) Judge Norton's written letter of resignation was disseminated to the Atlanta press on March 23, 1984, published on March 24, 1984, prior to the effective date of the longer reappointment term commencing April 1, 1984.

(iv) On October 4 and 5, 1984, a notice was published in the *Fulton County Daily Report* announcing that a successor bankruptcy judge was sought to fulfill the vacancy caused by Judge Norton's resignation.

(v) The following books and treatises did not prevent Judge Norton's resignation: *Norton Bankruptcy Law and Practice* (Callaghan & Co., 1981); *Real Property Arrangements under Chapter XII, Federal Bankruptcy Act* (Harrison, October 19, 1977), its *1979 Supplement,* and *Evidence in Federal Bankruptcy Trials* (Harrison, August, 1978).

(vi) The information contained in my brief in the Eleventh Cicruit was one of several reasons for the resignation.

9.

In the course of considering whether to appeal the February 2, 1984, order of the Fulton Superior Court I reviewed decisions of the Court of Appeals on the effect of dismissals with prejudice, particularly: *Holiday Inns, Inc. v. Page,* 151 Ga. App. 55 (258 S.E.2d 909) (1979), and *Rowland v. Vickers,* 131 Ga. App. 121 (205 S.E.2d 503), and I formed the following conclusions:

(a) The Court of Appeals sometimes bases its decisions on technicalities and is unsympathetic with missteps of procedure.

(b) The court sometimes misjudges the true equities in a case.

(c) The court sometimes misses subtle issues of jurisprudential complexity.

Accordingly, I determined that I would probably lose in the Court of Appeals but would probably obtain a reversal on petition for writ of certiorari from the Supreme Court of Georgia based on the following cases: *Page v. Holiday Inns, Inc.,* 245 Ga. 12 (262 S.E.2d 783) (1980), which reversed a Court of Appeals decision, and *Durham v. Marchman,* 246 Ga. 645 (272 S.E.2d 343) (1980).

10.

It was also important to me in determining whether to appeal the order of February 2, 1984, that the Court of Appeals would accurately set forth in its opinion certain critical facts, for example:

(a) That I did not know about the December 8, 1982, libel until after the date of settlement.

(b) That the appellees signed the Settlement Agreement and General Release ("the accord") before I did and before perpetrating the December 8, 1982, libel;

(c) That I *contended* that a part of the contemplated consideration for the accord was International's indemnifying me in the event I had to pay a judgment to Typo-Repro in excess of the amount I was holding in trust. For example, see my letter to appellee Swank and others on October 10, 1983, November 3, 1983, and Mr. Swank's reply of November 10, 1983, which does not negate a right of indemnification claimed in Mr. Johnson's affidavit enclosed with my letter of October 10, 1983, all of which are attached hereto as Exhibit "A" and incorporated herein by reference.

I determined that the court would probably state these facts accurately.

11.

Between February 2, 1984, and March 2, 1984, I traveled to the Court of Appeals and reviewed a copy of the 1981 Rules of the Court of Appeals. There was a provision specifying the form for the notice of appeals which I noted. There was no provision for penalty for a frivolous appeal.

12.

I prepared a notice of appeal from the February 2, 1984, order by following Rule 33 of the Court. I filed this notice in the Fulton Superior Court on March 2, 1984.

13.

Based on the request in the notice of appeal, a clerk of the Fulton Superior Court prepared an original and copy of the record in said court and submitted to me a bill for $1,720.25, which I paid on May 8, 1984.

14.

I received notice on May 15, 1984, from the Court of Appeals that Case No. 68930 had been docketed May 11, 1984.

15.

On May 15, 1984, my former secretary received in the mail Volume 37, No. 18, of the *Georgia Law Reporter*, 169 Ga. App. 424-490 (Harrison, May 3, 1984), which is marked, "Second class postage paid at Norcross, Ga." A copy of this booklet is attached hereto and incorporated herein by reference as Exhibit "B." The front of said softback volume reads in part as follows:

"IMPORTANT NOTICE

> "The Court of Appeals of Georgia on April 4, 1984, adopted the following rule:
>
> "The court may with or without a motion impose a penalty not to exceed $500.00 against an appellant in any civil case in which there is a direct appeal, application for discretionary appeal, application for interlocutory appeal or motion which the court determined to be frivolous. This rule applies only to those cases in which there is no money judgment."

I did not see this volume prior to November 16, 1984.

16.

I did not attend oral argument in the instant appeal on July 25, 1984, but I did submit a supplemental brief in lieu of oral argument.

17.

I did not receive personal notice by United States First Class Mail or by hand or by any other means of the promulgation of Rule 26 (b) of the Court of Appeals of Georgia by the clerk of that court, and the first personal notice I received of the rule was November 16, 1984, when I received copy of the Opinion of November 14, 1984.

18.

Considering the risks inherent in any appeal, and particularly, the legal, factual and psychological concerns herein expressed, I would not have filed on March 2, 1984, the instant appeal in the Court of Appeals, had I known that Rule 26 (b) would be enacted and applied retroactively to the appeal.

WINFORD KENT BISHOP

Sworn to and subscribed before me
this 26th day of November, 1984.

/s/ Wendy L. Pito
NOTARY PUBLIC

My commission expires September 18, 1987.

Case No. 41894

IN THE
SUPREME COURT
STATE OF GEORGIA

WINFORD KENT BISHOP, Petitioner,

versus

INTERNATIONAL PAPER COMPANY,
JEFFREY M. SMITH,
CHARLES MYNEDER, and
BEN R. SWANK, JR., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO COURT OF APPEALS OF GEORGIA

WINFORD KENT BISHOP
Counsel for Petitioner
1835 First Atlanta Tower
Atlanta, Georgia 30383

DATED: December 31, 1984.

B.

Regarding Division 3 of Opinion

1. Where the Court of Appeals of Georgia promulgated new Rule 26 (b) which is substantially similar to new Supreme Court Rule 14, the former actually reading, as follows:

> "The court may with or without a motion impose a penalty not to exceed $500.00 against an appellant in any civil case in which there is a direct appeal, application for discretionary appeal, application for interlocutory appeal or motion which the court determines to be frivolous. This rule applies only to those cases in which there is no money judgment."; and

2. Where the Court of Appeals applied this Rule in its first opinion of November 14, 1984, a copy of which is attached to this petition as an exhibit, assessing a penalty of $500 against petitioner, necessitating his expending the time and costs to prepare and file a "First Possible Response to the Court's Own Motion Under Rule 26 (b)" (herein "First Possible Response") and an "Affidavit," dated November 26, 1984 (herein "First Possible Affidavit") in connection with a "Motion for Rehearing" which produced a substituted opinion of December 10, 1984, not assessing any penalty, but invoking the rule, yet declining to exercise discretion to apply same to this direct appeal; and

3. Where the notice of appeal in this case was filed on March 2, 1984, based upon a state of facts, law and perceived psychology in existence at that time,[35] and

4. Where the Court of Appeals adopted Rule 26(b) on April 4, 1984, published it in Volume 37, No. 18 of the *Georgia Law Reporter* (covering 169 Ga. App. 424-490) on May 3, 1984, marked received by petitioner's former secretary on May 15, 1984,[36] four days after the appeal was docketed in the Court of Appeals on May 11, 1984,[37] but of which petitioner had no personal notice until November 16, 1984.[38]

EIGHTH QUESTION PRESENTED: Was petitioner's expenditure of time and effort in composing 28 pages of said legal documents, and costs[39] in mailing same by United States Certified Mail, Return Receipt Requested in respect of the vacated November 14, 1984 opinion, to be considered "property," and was same deprived by due process of law under the Fourteenth Amendment of the United States Constitution and Article I, Section I, Paragraph I of the 1983 Constitution of the State of Georgia.

NINTH QUESTION PRESENTED: By invoking Rule 26(b) did not the Court of Appeals deprive petitioner of the equal protection of the laws under the Fourteenth Amendment to the United States Constitution and Article I, Section I, Paragraph II of the 1983 Constitution of the State of Georgia because the rule treats two classes of appellants in civil cases differently and there is no reasonable basis for discriminating between the classes.

TENTH QUESTION PRESENTED: Where a petitioner seeks to change existing law and has a factual basis suggesting the creation of an exception to existing law, Does a party have a right to appeal to the Court of Appeals in order to seek certiorari on the issue whether existing law should be changed.

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[35] "First Possible Affidavit," ¶14, 15, p.27.

[36] Id., ¶15 at 27.

[37] Id., ¶14 at 27.

[38] Id., ¶15 at 27.

[39] The Court's opinion of November 14, 1984, clearly deprived petitioner of property in that it exacted a penalty of $500 against him. It was not necessary to show the expenditure of time, effort and expense to prove a deprivation of property. When the $500 penalty was lifted, petitioner no longer had a right to file an affidavit to support a loss of property. Court of Appeals Rule 48 (3). Petitioner asks this Court to take judicial notice that the "First Possible Response" and "First Possible Affidavit" were filed by United States Certified Mail, Return Receipt Requested, in connection with "Motion for Rehearing" and a portion of the postage to dispatch an original and two copies of the combined document by United States Certified Mail, Return Receipt Requested, was $2.00.

MOTION OF RESPONDENTS FOR SANCTIONS AGAINST PETITIONER PURSUANT TO SUPREME COURT RULE 14

Respondents International Paper Company, Jeffrey M. Smith, Charles Myneder, and Ben R. Swank, Jr., hereby move pursuant to Supreme Court Rule 14 for the imposition of sanctions against Petitioner Winford Kent Bishop for filing this frivolous petition for certiorari.

The Georgia Court of Appeals held that his appeal from the Superior Court's Order was frivolous under Court of Appeals Rule 26(b), and assessed a penalty of $500.00 against Mr. Bishop. In its revised decision of December 10, 1984, the Court of Appeals *affirmed* its holding that Mr. Bishop's appeal was frivolous, but elected not to assess the $500.00 penalty against Mr. Bishop since his Notice of Appeal had been filed before the effective date of Court of Appeals Rule 26(b).

Court of Appeals Rule 26(b) is intended to serve the same purpose as Supreme Court Rule 14. Accordingly, the Court of Appeals' finding that Mr. Bishop's appeal was frivolous strongly suggests that this petition is also frivolous.

Indeed, Mr. Bishop's petition for certiorari is even more frivolous than his appeal to the Court of Appeals. As explained by Respondents in their Memorandum in Opposition, this case raises no issues of public significance. The question decided below was that a Settlement Agreement providing that litigation be dismissed with prejudice precluded Mr. Bishop from filing a virtually identical suit against the same parties. This holding is clearly correct. Certainly, this fact-specific case is not worthy of this Court's review.

Since Supreme Court Rule 14 was in effect prior to his filing of the petition for certiorari, Mr. Bishop cannot claim that he was unaware of the Rule. Respondents respectfully request that the sanctions provided for in Supreme Court Rule 14 be imposed against Mr. Bishop.

Respectfully submitted,

JEFFREY M. SMITH

THOMAS B. METZLOFF

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Attorneys for Respondents
International Paper Company,
Charles Myneder, Ben R. Swank, Jr., and Jeffrey M. Smith

Case No. 41894

IN THE
SUPREME COURT OF THE STATE OF GEORGIA

WINFORD KENT BISHOP, Petitioner,

versus

INTERNATIONAL PAPER COMPANY,
JEFFREY M. SMITH,
CHARLES MYNEDER, and
BEN R. SWANK, JR., Respondents.

MOTION FOR RECONSIDERATION BASED ON COURT'S APPLICATION OF RULE 14 UNCONSTITUTIONALLY AND ARBITRARILY (CAUSED BY JUDICIAL CONCEALMENT THAT $100,000 PAYMENT WAS PAID INTO TRUST *)

WILLIAM B. HOLLBERG
WINFORD KENT BISHOP
1835 First Atlanta Tower
Atlanta, Georgia 30383
404/658-1110

DATED: February 4, 1985

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* "[Petitioner] agrees that he shall hold sufficient of said monies *in trust* for the purpose of paying, and he agrees as soon as practicable to pay from said monies, all expenses and obligations incurred in [his] aforesaid representation of International which may now be unpaid." Settlement Agreement and General Release, page 2, paragraph 1, line 3 (R-1013). [Emphasis added.] This is a trust. *Featherston v. Richardson*, 68 Ga. 501 (1882). Concealment of a trust specified in a document otherwise quoted at length, plus failure to afford the equal protection of OCGA §53-12-3(a), are outrageous and a violation of the Fourteenth Amendment for which a writ of certiorari would lie. Cf. *Live Oak Water Users Assn. v. Railroad Comm.*, 269 U.S. 354, 357, 70 L.E. 305, 308 (1926) (dictum).

TO THE HONORABLE JUSTICES
OF THE
SUPREME COURT OF GEORGIA

GREETINGS:

COMES NOW the petitioner, Winford Kent Bishop, by counsel and moves this Honorable Court for reconsideration of its order dated January 25, 1985, denying his Petition for a Writ of Certiorari to the Court of Appeals and imposing a penalty of $200 against him for frivolous appeal. Petitioner's affidavit in support of this motion is attached hereto and incorporated herein by reference.

I.
INTRODUCTION

Petitioner will show that his Motion for Reconsideration should be granted on two grounds:

> First, relating to the imposition of the $200 penalty, Petitioner will show that Rule 14 of Rules of the Supreme Court of Georgia is unconstitutional because (1) it is so vague and uncertain on its face that it violates: (a) the procedural Due Process requirements of the Fourteenth Amendment of the United States Constitution and (b) the rights of free speech and expression of the First Amendment of said constitution, (2) it establishes arbitrary classifications of appellants and discriminates invidiously among them in violation of the Equal Protection requirements of the Fourteenth Amendment, (3) it violates cognate provisions of the Georgia Constitution, and (4) the provisions of OCGA 15-2-17 and OCGA 15-2-18.
>
> Second, Petitioner's motion will show that all courts have outrageously failed to address the critical issue presented in the appeal, that being *the existence of a trust* under *Featherston v. Richardson*, 68 Ga. 501 (1882),

making the so-called settlement between the parties only an executory accord.

II.

RULE 14 IS A JUDICIALLY-CREATED SUBSTANTIVE RULE AND MAY BE CHALLENGED UNDER THE GEORGIA, UNITED STATES CONSTITUTIONS

This court has held that the same state and federal constitutional requirements that apply to statutes also apply to judicially-made rules. *Crowder v. Department of State Parks*, 228 Ga. 436, 440 (185 S.E.2d 908) (1971) (doctrine of sovereign immunity); *Bickford v. Nolen*, 240 Ga. 255 (240 S.E.2d 40) (1977) (automobile guest passenger rule).

The United States Supreme Court has held that the Fourteenth Amendment of the United States Constitution applies to rules of state supreme courts, *Mayer v. Chicago*, 404 U.S. 189, 30 L.E.2d 372, 92 S.Ct. 410 (1971) (rule 607 of Illinois Supreme Court providing for free trial transcripts to indigents in felony cases only); and rules of state superior courts, *In re Application of Griffiths for Admission to the Bar of Connecticut*, 413 U.S. 717, 37 L.E.2d 910, 93 S.Ct. 2851 (1973) (rule 8[1] of Connecticut Practice Book requiring United States citizenship for Bar membership).

Accordingly, if a state court rule is sustained against a constitutional attack under the Fourteenth Amendment, the aggrieved party can appeal to the United States Supreme Court under 28 U.S.C. §1257 (2). *Mayer v. Chicago*, supra, 30 L.E.2d at 377; *In re Griffiths*, supra, 37 L.E.2d at 913. Cf. *Rinaldi v. Yeager*, 384 U.S. 305, 16 L.E.2d 577, 86 S.Ct. 1497 (1966) (New Jersey statute invidiously discriminating among indigent prisoners who are incarcerated and those who are not regarding reimbursement to county for cost of appellate transcript). Petitioner makes this point (a) to seek a stay of remittitur while he seeks an appeal to the United States Supreme Court should this motion be denied and (b) to comply with Rule 61 of the Rules of this Court.

III.

RULE 14 IS UNCONSTITUTIONAL BECAUSE IT IS VOID FOR VAGUENESS

A.

RULES OF CONSTRUCTION

Petitioner presumes that two or more members of the Supreme Court now sitting in judgment on this constitutional attack on Rule 14 drafted the rule, discussed its meaning and applicability among themselves, and concurred in its adoption. Each justice, as well as the court, is the author of the rule, the draftsman, the maker. Recently you wrote:

> "In the event of doubtful or ambiguous language our courts adhere to the rule of contra proferendum, construing the language against the maker of the document." *Perling v. Citizens & Southern Nat. Bank,* 250 Ga. 674, 676 (300 S.E.2d 649) (1983).

Should the rule of construction be any less strict when it is the *Supreme* Court of our sovereign state which issues the ambiguous language? The Supreme Court in Justice Bleckley's day would say, No:

> "Where a written [document] has an apparent meaning at variance with its real meaning, it may bind the author of the ambiguity contrary to its real meaning, if this meaning was so obscurely expressed that the other party was likely to be misled and was misled, and if the circumstances entitled him to timely notice of his mistake, and notice was not given." *Hill v. John P. King Mfg. Co.,* 79 Ga. 105, 109 (3 S.E. 445) (1887).

The federal courts are aware of the Supreme Court's rules of construction, as applied to everybody else:

> "In addition, any lack of clarity or any ambiguity in the policy is considered the responsibility of the insurance company, for it is the company that drafts the policies and must

> be required to draft clearly." *Ranger Insurance Co. v. Culberson,* 454 F.2d 857 (5th Cir. 1971) citing to predecessor of OCGA §13-2-2), *cert. denied* 407 U.S. 916 (1972).

So, will the Supreme Court be equally strict on itself?

B.

VOID FOR VAGUENESS

The Constitutions of the United States (First Amendment) and the State of Georgia (Article I, Section I, Paragraph V) protect the right of free speech against infringement. Where a statute enacted by a state legislature, or in this instance a rule enacted by the highest state court, reaches directly to expression sheltered by these provisions, the Due Process requirement under both constitutions of definiteness is violated where the statute or rule does not meet strict standards of specificity. *Smith v. Goguen,* 415 U.S. 566, 39 L.E.2d 605, 94 S.Ct. 1242 (1975).

In order to more closely examine Rule 14, it is set out here fully:

> "The court may with or without a motion impose a penalty not to exceed $500 against an *appellant* in any civil case in which there is a direct appeal, application for discretionary appeal, application for interlocutory appeal, petition for certiorari, or motion which the court determines to be frivolous. This rule applies only to those cases in which there is no money judgment." [Emphasis added.]

The first ambiguity in Rule 14 is the provision allowing imposition of a penalty "against an appellant in any civil case." On its face Rule 14 does not allow imposition of a penalty on any party other than an appellant. Petitioner was not an appellant before this Court. He had been an appellant before the Court of Appeals and was attempting to become an appellant before the Supreme Court. But this Court denied his petition for a writ of certiorari. Petitioner never became an appellant in this Court.

Rule 14 should not be applied in this fashion because the Supreme Court has never had jurisdiction of the subject matter of this appeal. The Court only has authority over the petition for certiorari. The Court would have to grant the petition for certiorari for the Court to have jurisdiction over the appeal.

For this Court to apply Rule 14 to appellant, the Court would be stating that it has the authority to impose a penalty on civil appellants *wherever they may be found.* For example, this Court could just as logically impose such a fine upon an appellant in a frivolous civil appeal to the superior court (from, say, the probate court or the magistrate's court, OCGA §5-3-29), to the United States Supreme Court (from an appeal to the Georgia Supreme Court), the United States Court of Appeals for the Eleventh Circuit (from, say, an appeal of a denial of a writ of habeas corpus petition pertaining to a conviction in the superior court), etc.

The meaning of the word "appellant" when used in Rule 14 is different from the word "petitioner." The words are not synonyms but describe different parties in the judicial process. *Black's Law Dictionary* (Fifth Ed., 1979), pp. 89, 1031.

> "Words generally bear their usual and common signification; but technical words, words of art, or words used in a particular trade or business will be construed, generally, to be used in reference to this peculiar meaning." OCGA §13-2-2.

However, there could be an appellant in this Court who is a petitioner for certiorari before this Court. For example, there are courts of inferior jurisdiction in this state from which a party has a right to petition for certiorari to the superior court. OCGA §5-4-1. In such instance, an appellant could come before this Court on appeal, and as a result of a petition for certiorari several steps ago in the procedural process, would clearly understand the potential liability for the Rule 14 penalty. Similarly, an appellant before this Court could petition or could have petitioned the United States

Supreme Court for a writ of certiorari and in that instance be an appellant before this Court and be liable under Rule 14 for a penalty in conjunction with a petition for certiorari. Cf. *Georgia Railway & Electric Co. v. Decatur,* 297 U.S. 620, 80 L.E. 925 (1936). However, the plain words of Rule 14 do not encompass petitioner, who is not an appellant in this Court, but has come before it by way of a petition for certiorari.

By way of contrast, the companion rule in the Georgia Court of Appeals, Rule 26(b), does not suffer this defect because it does not undertake to encompass those who come before it by way of petition for certiorari.

The vagueness of Rule 14 is further demonstrated by a review of the comparable *Federal Rules of Appellate Procedure* and the Rules of the United States Supreme Court. FRAP, Rule 38 provides as follows:

> "*Damages for Delay.* If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

In this rule there is a clear and unmistakable application only to appellants, as opposed to petitioners for, say, a writ of mandamus to a District Court. Rule 49.2 of *Rules of the United States Supreme Court* provides in the following manner:

> "When an appeal *or petition* for writ of certiorari is frivolous, the court may award the appellee *or the respondent* appropriate damages." [Emphasis applied.]

It appears that Rule 14 was taken from a rule drawn by and for use in an intermediate level appellate court and was inadequately modified for application to Supreme Court review.

If Rule 14 of this court is intended to encompass the same penalties as set forth in FRAP Rule 38 or United States Supreme Court Rule 49.2, then Rule 14 has simply failed. Although Rule 14 imposes no direct criminal sanction upon those held to be in violation, it, of course, could be enforced by criminal contempt under the statutory authority of the Court. OCGA §15-218. In addition, Rule 14 does impose a strong civil penalty which is particularly worrisome for attorneys because of the implication that counsel has engaged in improper conduct.

Petitioner, as well as all other parties to litigation in courts in this state, has the right to the fullest availability of these courts and the rights of full expression and association requisite to participation in the judicial process. The serious and inherent ambiguities in Rule 14 render it so indefinite that a person of ordinary intelligence could not have contemplated that the conduct penalized by the Court in its order of January 25, 1985, was in fact prohibited. It should be abandoned by the Court, in favor of a more thoughtful substitute.

Against this showing the affidavit of petitioner should be reviewed. It is attached hereto and incorporated herein by reference. He swears that he reviewed Rule 14 after receiving respondents' motion for sanctions, concluded that the Rule did not apply to "a petitioner," and therefore, did not respond to the motion to impose the rule. Petitioner is an attorney at law. He knows there is a substantial and meaningful difference between "an appellant" and "a petitioner." His understanding is entitled to great respect by this Court since there is no jury to protect petitioner from imposition by this Court of a rule just enacted by this Court without any prior interpretation.

C.

"FRIVOLOUS" STANDARD IS IMPERMISSIBLY VAGUE IN A STATE SUPREME COURT WHICH REGULARLY RECONSIDERS, AND SOMETIMES OVERRULES LONG-ESTABLISHED PRECEDENT OF THE COURT

In 1971, this Court reconsidered the doctrine of sovereign immunity which the Court held "was imbedded in the common law of England at the time of the American Revolution." *Crowder v. Department of State Parks,* 228 Ga. 436, 439 (158 S.E.2d 908) (1971). By the Court's count, *petitioner sought to overrule ten (10) full bench decisions. In*

1977, this Court reconsidered the automobile guest passenger rule which had been judicially established in this state 56 years earlier. *Bickford v. Nolen,* 240 Ga. 255 (240 S.E.2d 40) (1977). *In 1982,* this Court reconsidered the validity of antenuptial agreements which had been ruled invalid 21 years earlier. *Scherer v. Scherer,* 249 Ga. 635 (292 S.E.2d 662) (1982).

By contrast, petitioner did not seek to have this Court or the Court of Appeals overrule prior precedents. He simply asked this Court to do the following:

> (a) distinguish *Kennedy v. Bateman,* 217 Ga. 458 (123 S.E.2d 656) and *James v. Tarpley,* 209 Ga. 421 (73 S.E.2d 188) (1952), along the lines given in the petition for certiorari at pp. 12-13; and
>
> (b) carve an exception to said cases based on one federal and one state precedent. Cert. petition p. 10.

Moreover, petitioner cited to the Court of Appeals several of the cases used by the Court of Appeals, including *Rowland v. Vickers,* 233 Ga. 67 (209 S.E.2d 592) (1974).

Thus, "frivolous appeal" had no ascertainable meaning at the time the Court entered its order of Januray 25, 1985. Application of Rule 14 to petitioner is impermissible under the First and Fourteenth Amendments to the United States Constitution and Georgia State Constitutions.

IV.

RULE 14 VIOLATES THE EQUAL PROTECTION REQUIREMENTS OF THE CONSTITUTIONS OF GEORGIA AND THE UNITED STATES

The Fourteenth Amendment of the United States Constitution and Article I, Section I, Paragraph II of the Constitution of the State of Georgia provide that governments shall not deny to citizens the equal protection of laws.

In *Rinaldi v. Yeager,* 384 U.S. 305, 16 L.E.2d 577, 86 S.Ct. 1497 (1966), a New Jersey statute pertaining to reimbursement for the cost of a transcript provided to indigent appellants convicted of crime was examined by the United States Supreme Court. The statute provided that upon affirmance the prison wages of the unsuccessful, incarcerated appellant could be withheld from him by prison officials and sent to the county treasurer to reimburse the cost of the transcript for his appeal. However, the statute did not impose this financial burden upon all who had been convicted in its courts and whose appeals had been unsuccessful. It required no repayment at all from a man who had received a suspended sentence or been placed on probation, regardless of how high his subsequent earnings might be. It required no repayment at all from an unsuccessful appellant who had been sentenced only to pay a fine.

The United States Supreme Court held: "To fasten a financial burden only upon those unsuccessful appellants who are confined in state institutions, however, is to make an *invidious* discrimination." [Emphasis added.] 16 L.E.2d at 580. The Court concluded:

> "Apart from its fiscal objective, *the only other purpose of this law advanced by the appellees is the deterrence of frivolous appeals.* Assuming a law enacted to perform that function to be otherwise valid, the present statutory classification is no less vulnerable under the Equal Protection Clause when viewed in relation to that function. By imposing a financial obligation only upon inmates of institutions, *the statute inevitably burdens* many whose appeals, though unsuccessful, were not frivolous, and *leaves untouched many whose appeals may have been frivolous indeed.*

> "This Court has never held that the States are required to establish avenues of appellate review, but *it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.*" [Emphasis added.] 16 L.E.2d at 581.

Rule 14, on its face and as applied, violates these prohibitions. Petitioner discussed this violation in connection with Court of Appeals Rule 26 (b) in his petition for a writ of certiorari, pp. 57-62, and will only summarize those arguments here.

Rule 14 applies by its terms only to an appellant "in any civil case," and to cases "in which there is no money judgment."

The two classifications made in Rule 14 appear not to be rationally related to a permissible judicial purpose. The higher courts of this State should be equally available, that is, upon the same terms and conditions to all litigants, whether civil or criminal, and without regard to the measure of the success of the litigation in lower courts, whether a money judgment has been obtained or denied.

To illustrate the absurdity of the failure to achieve a money judgment requirement, consider the instance where $1 is given in damages. In those kinds of cases such a nominal award typically emphasizes the insignificance of the litigation. By contrast, a judgment not awarding monetary damages frequently relates to matters in hot dispute, such as admissibility of evidence, credibility of witnesses, interpretation of contracts and agreements, etc. See, also, the example given in the petition for a writ of certiorari, at pages 58 to 59.

The civil case requirement also violates rules which prohibit classifications based upon wealth. Presumably, most civil cases deal with matters of wealth in one form or another, with issues centering around the acquisition or disposition of assets. Although authorities in this area view the matter of wealth classifications from a different perspective, they are "highly suspect," *McDonald v. Board of Election Commissioners,* 394 U.S. 802 at 807, 22 L.E.2d 739 at 744, 89 S.Ct. 1404 (1969); *Harper v. Virginia State Board of Elections,* 383 U.S. 663 at 668, 16 L.E.2d 169 at 173, 86 S.Ct.

1079 (1966). The civil case requirement also violates the concept of equal access to justice since there is no rational basis to suggest why criminal justice is not equally burdened. And *Rinaldi v. Yeager,* supra, implies that a law enacted to deter frivolous appeals of criminal appeals could be otherwise valid. 16 L.E.2d at 581. Although this issue has been raised in the context of filing fees, where a rational basis was required for the imposing of such fees, it is suggested that such litigation is authority to prohibit restricting access to civil justice without a rational basis. Cf. *Boddie v. Connecticut,* 401 U.S. 371, 28 L.E.2d 113, 91 S.Ct. 451 (1971).

By way of contrast, consider that FRAP 38 and Rule 49.2 of the United States Supreme Court make no distinction whatsoever between civil and criminal cases or whether money judgments have been entered below.

In view of the foregoing, the denial to movant of his rights to equal protection of the law should not be further perpetuated by this court.

V.

RULE 14 EXCEEDS THE COURT'S AUTHORITY AND VIOLATES OCGA 15-2-17 AND OCGA 15-2-18

In OCGA §15-2-17 the Supreme Court is given the authority to adopt rules for conducting its own business with the limitation that such rules be, "with due regard to the rights of the parties and counsel concerned." As shown above, Rule 14 is ambiguous and unclear, it violates the equal protection rights of litigants, and as will be discussed, it deprives litigants of due process requirements. Therefore, Rule 14 violates OCGA §15-2-17.

Rule 14 also violates OCGA §15-2-17 because the rule states that the Supreme Court may impose a $500 penalty. There is no statutory basis upon which the Supreme Court can justify such a rule. This court may have authority to impose such a rule under OCGA §15-2-18, but in that event, the rule would have to be ratified and confirmed by the General Assembly, which has not been done. Affidavit, p. 10.

Further complicating the intellectual morass of Rule 14 is its silence on the beneficiary of the penalty. Does the penalty go to the State, to the appellee, to the Clerk of the Supreme Court, to the Department of Human Resources for relief for the poor? At least with FRAP 38 and Rule 49.2 of the United States Supreme Court, it is clear that the damages and awards resulting from those rules go to the appellee or respondent, as appropriate.

It should also be noted that Congress has specifically granted authority to the Supreme Court and the Courts of Appeals to enact rules 38 and 49.2. 28 U.S.C. §§1912, 2103.

VI.

RULE 14 VIOLATES PROCEDURAL DUE PROCESS REQUIREMENTS OF THE CONSTITUTIONS OF GEORGIA, UNITED STATES

A.

PROPERTY INTEREST

The Fourteenth Amendment of the United States Constitution and Article I, Section I, Paragraph I of the 1983 Constitution of the State of Georgia provide that the life, liberty or property of any person shall not be deprived without due process of law. Petitioner has discussed these sections in his petition for writ of certiorari, pp. 54-57. What is at issue here is not only the property interest which Petitioner or any litigant would have in the cost required to proceed with an appeal, such as movant has incurred, but also the interest in the property involved in the dispute.

Procedural due process requirements exist to afford "an opportunity to be heard . . . 'at a meaningful time and in a meaningful manner,'" to protect these interests. *Fuentes v. Shevin*, 407 U.S. 67, 80, 32 L.E.2d 556, 570, 92 S.Ct. 1983

(1972). It has also been stated that due process "calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer,* 408 U.S. 471, 481, 33 L.E.2d 484, 494, 92 S.Ct. 2593 (1972). Rule 14 provides no assurance for notice to a party, or counsel that a penalty is being considered and makes no provision for such party or counsel to participate in those proceedings.

Most importantly, some procedural safeguards are called for in the application of Rule 14, in the context of the serious and inherent inadequacies in Rule 14 which have been previously discussed. If this court is going to impose fines and penalties upon litigants when the language of the rule is vague, when by its terms the rule illegally treats persons differently, and when the rule violates the statutory authority given to the court, some specific procedures providing notice and hearing should be provided.

Finally, it should be noted that although respondents only sought damages "for filing this frivolous petition for certiorari," this Court granted a penalty "for frivolous appeal." Petitioner takes the legal position that this constituted a denial of respondents' motion and a grant of the Court's own motion. Petitioner received no notice of the Court's own motion and this motion is his first opportunity to respond. Affidavit, p. 7.

B.

LIBERTY INTEREST

In addition to the potential deprivation of a property interest, Rule 14 undertakes to deprive a litigant of a liberty interest, being the right to participate in the judicial process. *Rinaldi v. Yeager,* 384 U.S. 305, 310, 16 L.E.2d 577, 581, 86 S.Ct. 1497 (1966). Before this liberty interest is entitled to protection, there must be a present legal entitlement under state law. *Board of Regents v. Roth,* 408 U.S. 564, 377, 33 L.E.2d 548, 561 (1972). Clearly movant, and other litigants, have a right to participate in the judicial system created in the state of Georgia and existing under its laws and for the benefit of its citizens. Art. I, Sec. I, Par. XII, ("No person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in *any* of the courts of this state." [Emphasis added.]) Constitution of Georgia.

Rule 14, as promulgated, and as applied, seeks to unconstitutionally deprive movant and other litigants of their liberty interest in availing themselves of this judicial system. Although the doctrine of substantive due process is out of favor as it applies to business and property interest, it is enjoying a resurgence as it applies to personal rights. Cf. *Moore v. City of East Cleveland,* 431 U.S. 494, 52 L.E.2d 531, 97 S.Ct. 1932 (1977). There is no more fundamental interest to a free society than the rights encompassed in and derived from the First Amendment protecting free speech and association. Concomitant with these fundamental rights is the necessity of citizen access to a judicial process which is fair in its operation and open to all on an equal basis. Rule 14 violates these precepts and is therefore void as being a violation of the requirements of substantive due process.

It is clear from this review that Rule 14 fails. It should not be applied to movant.

VII.

FAILURE OF ALL COURTS OF THIS STATE TO ADDRESS CRITICAL ISSUE PRESENTED IN THE APPEAL, THAT BEING THE EXISTENCE OF A *TRUST*, MAKING THE SO-CALLED SETTLEMENT ONLY AN EXECUTORY ACCORD, JUSTIFIES MOTION TO RECONSIDER

A.

DESPITE RESPONDENTS' CONTENTIONS NOTICE OF INTENTION TO SEEK CERTIORARI WAS TIMELY FILED IN COURT OF APPEALS

Petitioner presumes that the Petition was originally denied because the Court of Appeals inadvertently docketed the Notice of Intention to file Certiorari on the wrong day and respondents made an issue on it. Memorandum, p. 1. The Order of that Court dated January 29, 1985, clears up this clerical error to conclude that the Notice was timely filed.

B.

$100,000 WAS PAID IN TRUST

It is without dispute below that Petitioner executed a bilateral agreement and release and signed dismissals of pending lawsuits with prejudice. However, the effect of that release and dismissals is at the core of the dispute which petitioner pursues.

A release does not operate to discharge a debt or bar other rights when its consideration was *delivered in trust* upon a condition which has never been fulfilled. The law is, except as the Georgia courts have applied to Petitioner, that this release would not become effective until the condition has been performed. *Featherston v. Richardson,* 68 Ga. 501 (1882); 5A *Corbin on Contracts,* §1239, p. 562, n. 85 (1964); *Halloran v. Fischer,* 126 Conn. 44 (9 A.2d 290) (1939).

Inasmuch as paragraph 1 of the unfulfilled "Settlement Agreement" plainly states that monies be held by Petitioner "in trust," Petitioner in fact held monies in trust and has monies in trust to this very day. And it was after the execution of the agreement and during the pendancy of the trust that Respondents committed libel against Petitioner. Since the release is only executory, Petitioner filed an action against Respondents for the libel and other existing claims.

VIII.

CONCLUSION

Petitioner respectfully requests this Court to reconsider the application of Rule 14 to him. Further, Petitioner urges this Court to reconsider the denial of his Petition For A Writ of Certiorari to the Court of Appeals.

Respectfully submitted,
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Case No. 41894

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SUPREME COURT
OF THE STATE OF GEORGIA

WINFORD KENT BISHOP, Petitioner,

versus

INTERNATIONAL PAPER COMPANY,
JEFFREY M. SMITH,
CHARLES MYNEDER, and
BEN R. SWANK, JR., Respondents.

AFFIDAVIT

STATE OF GEORGIA
COUNTY OF FULTON

I, WINFORD KENT BISHOP, being duly sworn, do hereby depose and say, as follows:

1.

I am a movant under Rule 34 in the Supreme Court of Georgia seeking reconsideration of its order of January 25, 1985, denying my petition for a writ of certiorari to the Court of Appeals of Georgia to review its revised judgment of December 10, 1984, in an appeal to that court from an order (containing no written reasons) from the Superior Court of Fulton County.

2.

I have personal knowledge of the facts stated herein except where the facts emanate from a court or judicial opinion and am competent to state them.

3.

The Supreme Court's order of January 25, 1985, denying my petition for a writ of certiorari states as follows:

> "This is a petition for the writ of certiorari to the Court of Appeals.
>
> "The petition for certiorari is denied.
>
> "On motion of the respondent for imposition of sanctions against the petitioner for frivolous appeal, a penalty of $200 is imposed against the petitioner for frivolous appeal. See Rule 14 of Rules of the Supreme Court of Georgia."

4.

I received on January 14, 1985, by United States Mail the following two documents:

> (1) "Motion of Respondents for Sanctions Against Petitioner Pursuant to Supreme Court Rule 14"; and
>
> (2) "Memorandum of Respondents International Paper Company, Jeffrey M. Smith, Charles Myneder, and Ben R. Swank, Jr."

I read same and noted that the only reason given by the respondents for imposition of sanctions was "for filing this frivolous petition for certiorari." (Motion, page 1.)

5.

Prior to leaving the state for several days (January 17 to 22, 1985) on a prearranged trip, I reviewed the law of Georgia pertaining to Rule 14 for its applicability or non-applicability to my petition for a writ of certiorari. Rule 14 was adopted by the Supreme Court on April 4, 1984, to be effective on July 1, 1984. Rule 14 reads as follows:

> "The court may with or without a motion impose a penalty not to exceed $500.00 *against an appellant* in any civil case in which there is a direct appeal, application for discretionary appeal, application for interlocutory appeal, petition for certiorari or motion which the court determines to be frivolous. This rule applies only to those cases in which there is no money judgment." [Emphasis added.]

6.

I am an attorney duly licensed to practice law in this State, have been a member of the State Bar of Georgia since 1971, and have engaged in an active trial and appellate practice over much of that period. Any Georgia attorney with any appellate experience knows there is a significant difference between "an appellant" and "a petitioner." An appellant is a party who has a right to appeal. A petitioner is a party who lacks a right to appeal but seeks permission to appeal. A petitioner does not become an appellant until the court petitioned grants him a right to appeal.

7.

I conducted legal research and found no Supreme Court cases interpreting Rulte 14. I presumed that the Supreme Court would hold no authority in this State to a higher standard of clear expository drafting than itself. I am familiar with the rule of construction that language in a document is construed most strongly against the drafter. The drafter of Rule 14 is the Supreme Court. Thus I presumed that any rule promulgated by the Supreme Court would be very strongly construed by the Court against the Court, and that the Court would not impose any implied meanings in the language used, nor should it on ethical and moral grounds.

8.

With said concepts in mind I analyzed Rule 14. I concluded that the Rule only applied to "appellants" in the Supreme Court of Georgia. Until a party becomes an appellant in the Supreme Court no sanction could be imposed on him. In interpreted the reference, "an appellant in any civil case in which there is a . . . petition for certiorari" to refer to one of two situations:

> (1) An appeal is filed in the Georgia Supreme Court from the Superior Court of, say, Fulton County with a subject matter which the 1983 State Constitution requires to be filed in the Supreme Court. By definition the case would have originated in the Probate Court of Fulton County, but was taken to the superior court under OCGA §5-4-1 by writ of certiorari for the correction of errors. Should the appellee file a motion for sanctions, the appellant would be "an appellant in any civil case in which there is a . . . petition for certiorari."
>
> (2) A decision of the Supreme Court of Georgia is the subject of a petition for a writ of certiorari to the Supreme Court of the United States which is granted and the case is returned to the Georgia Supreme Court for further proceedings. The latter would then have an opportunity to pass upon the wisdom of the preceding cert. petition to the United States Supreme Court. The Georgia court could disagree with the construction urged by the former petitioner and present appellant in the petition for certiorari filed in the Supreme Court and find that the cert. petition was frivolous.
>
> In *Georgia Railway & Electric Co. v. City of Decatur,* 297 U.S. 620, 80 L.E. 925 (1936), the Georgia Supreme

Court had construed a statute, *Georgia Power Co. v. City of Decatur,* 179 Ga. 471 (1934), but the United States Supreme Court had on review interpreted the statute differently, 295 U.S. 165, 79 L.E. 1365 (1935), had reversed and remanded the case to the Georgia Supreme Court which explained that its decision had been misinterpreted, *Georgia Power Co. v. Decatur,* 181 Ga. 187 (1935), and this decision had again been submitted to the United States Supreme Court which found that the Georgia Supreme Court had not ruled inconsistently with the United States Supreme Court's earlier decision.

If Rule 14 had then existed, and if the procedural means for taking the case to the United States Supreme Court had been a petition for a writ of certiorari instead of an appeal (which it could have been, see Stern & Gressman, *Supreme Court Practice* ([Fifth Ed. 1978] at 166), then upon the first remand to the Georgia Supreme Court, or after the second decision by the United States Supreme Court, the prevailing party could have petitioned the Georgia Supreme Court for imposition of a penalty for a frivolous appeal against the appellant who would have been "an appellant in any civil case in which there is a . . . petition for certiorari." This could also happen when a common law, not statutory (28 U.S.C. §1257), petition for writ of certiorari is sought. Cf. *Head v. California,* 374 U.S. 509, 10 L.E.2d 1047, 83 S.Ct. 1883 (1963).

9.

I therefore concluded that respondent's motion for sanctions "for filing this frivolous petition for certiorari" did not fall under the ambit of Rule 14 and no response was necessary since the Supreme Court would strictly construe its own rules out of fundamental fairness in a case of first impression.

10.

The Supreme Court, however, in its order of January 25, 1985, did not impose sanctions "for filing this frivolous petition for certiorari" as requested by the respondents. Rather, this Court imposed a penalty "for frivolous appeal."

11.

In seeking to interpret the Supreme Court's order after receiving same on January 28, 1985, I conclude that either the Supreme Court made a mistake in interpreting the relief sought by respondents, or impermissibly metamorphosed same into the relief granted. For purposes of this constitutional challenge, I take the legal position that the Supreme Court denied respondents' motion for sanctions "for filing this frivolous petition for certiorari" and made its own motion to grant sanctions "for frivolous appeal."

12.

I was given no notice of the Court's own motion to impose sanctions "for frivolous appeal," nor afforded an opportunity to respond prior to entry of the order. The Court offered no hearing on the motion.

13.

The motion for reconsideration of the Supreme Court's per curiam order of January 25, 1985, into which this affidavit is incorporated by reference, is my first opportunity to raise substantial constitutional issues that Rule 14 is unconstitutional under the United States and Georgia Constitutions because (a) the rule is so vague and uncertain that it violates procedural due process requirements of the Fourteenth Amendment and fundamental rights to free speech and expression under the First Amendment, (b) the rule impermissibly creates several classes of appellants and invidiously discriminates among them in violation of the Equal Protection clause of the Fourteenth Amendment, (c) its application to the facts of this case without notice and an opportunity to be heard violates procedural Due Process requirements of the Fourteenth Amendment, and (d) on its face and as applied the Rule violates similar provisions of the 1983 Constitution of the State of Georgia and OCGA §§15-2-17, 18.

14.

In my professional judgment a motion for reconsideration in the Supreme Court of Georgia is an inadequate procedure to raise said issues. For one reason, the Supreme Court drafted Rule 14. I take the legal position that the Rule is unconstitutional on its face and as applied. The Supreme Court is now the only authority in the State of Georgia which can decide the constitutional issues which until this stage of the litigation could not have been previously raised. For a second reason, the Supreme Court apparently changed the respondents' motion into something it was not. Therefore, I do not waive such rights as I may possess to seek relief by adequate procedure in another forum or forums. I submit this affidavit in opposition to the court's own motion to impose a penalty "for frivolous appeal," in opposition to respondents' motion to impose a penalty "for filing this frivolous petition for certiorari" and in support of the motion for reconsideration.

15.

The order of the Superior Court of Fulton County from which the instant direct appeal was taken states in material part as follows:

> "The above-styled matter came before this Court on January 13, 1984, for a hearing on Defendants' Motion for Summary Judgment.
>
> "After having heard oral argument from counsel for Defendants and from Plaintiff, proceeding *pro se,* and after thorough review of the motion, the briefs and affidavits in support thereof and in opposition thereto, as well as the entire file of record, the Court hereby grants the motion and dismisses Plaintiff's Complaint with prejudice.
>
> "IT IS SO ORDERED.
>
> "This 2nd day of February, 1984."

16.

I filed a notice of appeal from the February 2, 1984 order of the Superior Court of Fulton County on March 2, 1984.

17.

A the time the notice of appeal was filed, the Supreme Court had not promulgated Rule 14. In fact, on March 2, 1984, the Rules of the Supreme Court stated that Rule 14 was "(Reserved)." *Georgia Law Reporter* (Harrison, June 21, 1979), Vol. 32, No. 25, covering 243 Ga. 528-580.

18.

On January 29, 1985, the clerk of the Supreme Court of Georgia, Mrs. Joline B. Williams, told me by telephone that the Rules of the Supreme Court of Georgia, effective July 1, 1984, had not been submitted for ratification and confirmation to and by the General Assembly under OCGA §15-2-18, or any other statute.

19.

Further affiant saith naught.

WINFORD KENT BISHOP

Sworn to and subscribed before me
this 4th day of February, 1985.

/s/ Wendy L. Peter
NOTARY PUBLIC

My commission expires Sept. 15, 19–.

FEATHERSTON *et al.* *vs.* RICHARDSON, administrator.

A deed contained the following provisions: "Now the further consideration (after the formal consideration of $1.00) of this deed is that the said Featherston (the grantee) is to pay off and discharge said mortgages (previously described), he contracting to be liable for the payment of the same only so far as the proceeds of the land will go towards their payment, in no case assuming any individual liability except to faithfully discharge his duty in managing or disposing of the land so as to make it or the proceeds thereof, if possible, pay off and discharge said mortgages, and to take the trouble and vexation of managing and disposing of the same off the hands of said Richardson (the grantor); and whenever said F. shall in any way pay off or satisfy said mortgages, then all of said lots and parts of lots of land shall belong absolutely to him, discharged from all claims and incumbrances whatever except those hereinafter mentioned and specified," (the mortgages and a right of homestead in the land) which were "to hold in abeyance and to prevent going into full effect the absolute right of G.W. Featherston:"

Held, that the deed conveyed the title in trust for the purpose of paying off the mortgages and with the vesting of an absolute title conditioned upon the grantee's performance thereof; and on entire failure so to do, a bill would lie to set aside the deed or to compel the execution of the trust.

(a.) The case is strengthened by allegations of application of the property by the grantee to his personal use, collusion with his wife, by having mortgages transferred to her, to obtain the property without performing the condition, and the like.

(b.) The grantor having died, his legal representative could maintain such a bill, and obtain full relief.

Deeds. Trusts. Title. Equity. Before Judge UNDERWOOD. Polk County. At Chambrs. October 10th, 1881.

E. H. Richardson, Jr., administrator, filed his bill against

G. W. Featherston and his wife, alleging as follows: E. H. Richardson, Sr., The father of complainant, died on May 23d, 1880, intestate, possessed of a farm in Polk county, containing 110 acres of land. On April 4th, 1881, complainant was appointed administrator of intestate. On entering upon his duties as such administrator, he found Featherston in possession of the said farm, claiming to hold under the following deed from E. H. Richardson, Sr.:

"GEORGIA—Polk county.

This indenture, made and entered into this 10th day of April, 1876, between E. H. Richardson, Sr., of the state and county aforesaid, and G. W. Featherston of the same place, witnesseth that for and in consideration of the sum of ten dollars to him in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and for the further considerations and with the limitations hereinafter mentioned and specified, the said E. H. Richardson, Sr., has this day bargained and sold, granted and conveyed, and by these presents does bargain and sell, grant and convey to the said Giles W. Featherston, his heirs and assigns, the following lots and parts of lots,"etc., [describing the property and continuing as follows:] "Whereas, there are incumbrances in the shape of mortgages on all the lots of land conveyed by this deed, given to secure the payment of notes given by the said E. H. Richardson, Sr., to several parties, towit: To said Giles W. Featherston, A. Shorter, G. W. West and A. Huntington, amounting in the aggregate to eleven thousand dollars: now the further consideration of this deed is that the said Featherston is to pay off and discharge said mortgages, he contracting to be liable for the payment of the same only so far as the proceeds of the land will go towards their payment, in no case assuming any individual liability except to faithfully discharge his duty in managing or disposing of said land, so as to make it or the proceeds thereof, if possible, pay off and discharge said mortgages, and to take the trouble and vexation of managing and disposing of the same off the hands of said Richardson; and whenever said Featherston shall in any way pay off or satisfy said mortgages, than all of said lots and parts of lots of land shall belong absolutely to him, discharged from all claims and incumbrances whatsoever, except those hereinafter mentioned and specified.

"This deed is in no case to be so construed or used as to prevent said mortgagees from foreclosing their mortgages according to law, nor in any way to hinder or delay them in prosecuting their claims according to law, leaving to said mortgagees the same rights and privileges of proceeding at once, should they think best, in the foreclosure of their mortgages and the collection of the money due on the same, as if this deed had never been made.

"It is further agreed that this deed is not to deprive the said Richardson of his right to have laid off, valued and set apart for the benefit of himself and family out of the lands mentioned herin, a homestead according to law. But said Richardson makes this deed expressly reserving to himself the right to encumber the land with a homestead, to be valued and set apart according to the constitution and existing laws of said state; said homestead when so valued and set apart during its legal existence to hold in abeyance and to prevent going into full effect the absolute right of G.W. Featherston. In testimony whereof," etc. (Signed and attested in the usual manner.)

The bill alleged that Featherston had not paid off the debts as was intended by the parties and required by the deed, but had bought up some of them, caused them to be assigned to him, and in turn had assigned them to his wife, who had assigned them as collateral security; that Featherston had also bought up other claims against the estate, which he threatened to enforce, though in fact settled. By amendment it was alleged that the provisions in the deed were conditions; but if held to be covenants, that the land should be sold to meet them, Featherston being insolvent. It was also charged that decedent had obtained a homestead in said land after the making of the deed; that a receiver had been appointed and sale been made of lands not covered by the homestead; that defendants were seeking to hold the claims open until they should accumulate sufficiently to absorb the entire estate. Waste was also charged. The prayer was to set aside the deed to Featherston and recover the land, or else to enforce its term, require a sale and settlement of the claims; for injunction, receiver and general relief.

The defendants demurred to the bill on the following grounds:

(1.) For want of equity.

(2.) Because the bill was multifarious.

(3.) Because complainant had an ample remedy at law.

The court overruled the demurrer, and the defendants excepted.

JACKSON, Chief Justice.

The error assigned in this record is the judgment of the court overruling the demurrer and retaining the bill.

The purpose of the bill is to set aside a deed made by the complainant's intestate, on the ground that the grantee had no title to certain lands conveyed by the intestate, because he had wholly failed to carry out the trusts confided to him, upon the fulfilment and performance of which his title to the land conveyed was to be absolute, but not before; or in the event that equity would not have the deed set aside and canceled absolutely, then that a decree be had compelling the grantee to fulfil the trust confided to him by the decedent, or deliver up the deed and restore the land to the estate.

This is the sum and substance, the aim and scope of the bill and amendments.

The equity of the bill rests, in the main, on the construction of the deed.

These words appear in it: "Now, the further consideration of this deed is that the said Featherston is to pay off and discharge said mortgages (previously described), he contracting to be liable for the payment of the same only so far as the proceeds of the land will go towards their payment, in no case assuming any individual liability except to faithfully discharge his duty in managing or disposing of the land, so as to make it or the proceeds thereof, if possible, pay off and discharge said mortgages, and to take the trouble and vexation of managing and disposing of the same off the hands of the said Richardson; and whenever the said F. shall in any way pay off or satisfy said mortgages, then all of said lots and parts of lots of land shall belong absolutely to him, discharged from all claims and incumbrances whatsoever, except those hereinafter mentioned an specified."Those thereinafter mentioned and specified are that the mortgagees may foreclose, and that a homestead for the grantor may be carved out of the land, which is "to hold in abeyance and to prevent going into full effect the absolute right of G. W. Featherston."

Without invoking the aid of surrounding circumstances, which, if the instrument itself were doubtful of construction, could well be invoked by parol,and which are set out in the bill, we are of opinion that its meaning is quite apparent from inspection. Its own light is enough to enable one to read it without pouring other rays upon it.

Two considerations are expressed in it, one is the usual trifling and formal consideration of ten dollars at its beginning, and the other and the real consideration is the (1.) extinguishment of the mortgages by "managing or disposing of the land," and (2.) relieving the grantor from "the trouble and vexation" of doing so himself.

This real consideration on which the title to the grantee is to become absolute—it being in him before in the former part of the deed, to enable him to manage and dispose of it to extinguish these mortgages—the bill alleges has not been performed at all by him, but the lands have been used for his own profit and emolument. Some of the mortgages are unpaid; others, which have been paid, are transferred to the wife of the grantee, and are outstanding in her name, with the view that the interest accumulating on them may eat up the entire lands. Thus the consideration of the deed has absolutely failed, the trust on which it is made has been betrayed, and the confidence of the grantor abused by this trustee, in whom a *quoad hoc* sort of title was put to enable him to pay off these mortgages, and upon the performance and faithful discharge of which trusts, and not until that performance and faithful discharge, the title to him individually and absolutely was to pass. The very consideration on which it was to be absolute or perfect, or freed from the mere character of a deed with power to manage and sell, is the faithful execution of the trust. It has not been faithfully executed, but fraudulently turned to the benefit of the trustee and his wife, if the bill be true, and the demurrer admits its truth.

Ought it not then to be cancelled and annulled by a court of equity? Could not this grantor have gone into equity and demanded its cancellation in his life time? If so, may not his legal representative do so now under this bill? Shall he hold the land and not pay for it what he agreed to pay, to-wit, the relief of the grantor from the trouble and vexation of managing and selling the lands so, as to extinguish the liens thereon—a payment which he has not made and can now never make, because the grantor is now free forever from all earthly vexation and annoyance?

Without considering, therefore, the surrounding circumstances, or any other charges in this bill, such as the insolvency of the grantee, his disclaimer of title while the grantor lived, his failure to record the conveyance during that life-time, his transfer of the mortgages to his wife, etc., there is equity in it springing out of the deed itself, and the utter failure to perform the trusts expressed therein, to require its retention in court and to demand a thorough and full trial thereof on the merits. The demurrer, in any view we can take of it, was properly overruled, and the judgment must be affirmed.

The entire bill, amendments and all, points to these lands, to the fraudulent use of a legal *quasi* title in them, and to relief from this fraud. In its entirety it appears to us harmonious and not multifarious. In equity all kindred causes may be embraced and all parties summoned to her bar, by amendment, which are necessary to adjudicate the questions at issue, and to complete the justice she seeks to mete out to all.

Judgment affirmed.

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This agreement entered into by and between Winford Kent Bishop (Bishop), sometimes referred to as party of the first part, and International Paper Company (International), Charles Myneder, Ben R. Swank, Jr. and Jeffrey M. Smith, sometimes collectively referred to as parties of the second part.

WHEREAS, Bishop was engaged to represent International in *In the Matter of Georgia Paneling Supply, Inc.*, Bankruptcy #B74-1628A, United States District Court, Northern District of Georgia, in *International Paper Company, et al. v. Aetna Business Credit, Inc., et al.*, #C75-1540A, United States District Court, Northern District of Georgia, in appeals from decisions and rulings in said matters and in various ancillary and related cases and concerns, and

WHEREAS, Bishop's representation of International in all the above described matters has been terminated and concluded, and

WHEREAS, disputes have developed including the amount of attorneys' fees, if any, to be paid Bishop by International, claims for damages by International against Bishop arising out of Bishop's said representation and claims by Bishop against parties of the second part arising out of alleged acts and filings in and subsequent to the termination of Bishop's said representation, all resulting in the filing of the following suits:

1. *International Paper Company v. Winford Kent Bishop*, Civil Action 82-2104A, United States District Court for the Northern District of Georgia; and
2. *Winford Kent Bishop v. International Paper Company, Charles Myneder, Ben R. Swank, Jr., and Jeffrey M. Smith*, Civil Action C-91586, Superior Court of Fulton County, Georgia, and

WHEREAS, the parties of the first and second parts desire at this time to fully and completely settle and dispose of all claims and obligations each party has against the other arising in any way out of or connected with the above described matters and relationships and any other claims of any kind whatsoever wheter or not related to the aforesaid matters and relationships;

NOW, THEREFORE, the afore-described parties of the first and second parts for and in consideration of the mutual promises, agreements, covenants and acts of all said parties hereto made and hereinafter set forth, each for itself, covenant and agree as follows:

1. International agrees to pay Bishop the sum of $100,000.00. Bishop agrees that he shall hold sufficient of said monies in trust for the purpose of paying, and he agrees as soon as practicable to pay from said monies, all expenses and obligations incurred in Bishop's aforesaid representation of International which may now be unpaid.

2. Bishop agrees that at the time of the execution of this "Settlement Agreement and General Release," he will sign the attached Dismissal (Exhibit A) of *Winford Kent Bishop v. International Paper Company, et al.*, Civil Action C-91586, Superior Court of Fulton County, Georgia, and hereby authorizes same to be filed by parties of the second part.

3. International agrees that at the time of the execution of this "Settlement Agreement and General Release" it will have signed the attached Dismissal (Exhibit B) of *International Paper Company v. Winford Kent Bishop,* Civil Action 82-2104A, United States District Court for the Northern District of Georgia, and hereby authorizes same to be filed by Bishop.

4. Bishop as party of the first part does hereby further agree to release and does release and forever discharge all parties of the second part, their respective past and present officers, directors, employees, representatives, attorneys, agents, partners, law partnerships or corporations, affiliates and subsidiaries from any and all claims, demands, actions, causes of action, damages and suits at law and equity of whatsoever kind, arising in any way whatsoever, directly or indirectly, from the matters described in this "Settlement Agreement and General Release," the afore-described suits

and litigation and all other claims of any kind whatsoever whether or not related to the aforesaid matters, suits and litigation, it being the intention of the parties that their rights be limited to the provisions of this Agreement.

5. Parties of the second part do hereby further agree to release and do release and forever discharge Bishop and Shane Geeter from any and all claims, demands, actions, causes of action, damages and suits at law and equity of whatsoever kind, arising in any way whatsoever directly or indirectly, from the matters described in this "Settlement Agreement and General Release," the afore-described suits and litigation and all other claims of any kind whatsoever whether or not related to the aforesaid matters, suits and litigation, it being the intention of the parties that their rights be limited to the provisions of this Agreement.

6. It is expressly understood and agreed by all parties hereto, that by agreeing to this settlement and release, none of said parties has admitted liability regarding any claim or obligation, and nothing contained herein or in any settlement negotiations shall be deemed or construed to be an admission of any party.

7. The parties hereto agree and covenant that the terms of this Agreement shall dispose of any and all obligations and rights which may be deemed to have existed in regard to the matters, claims, suits and litigation described herein and all other claims of any kind whatsoever whether or not related to the aforesaid matters, claims, suits and litigation that existed prior to the execution of this Agreement, and further agree that no act or duty remains to be performed or discharged by any of said parties except as herein provided.

8. This Agreement shall not be binding or enforceable in any particular until it and the herein described Dismissals (Exhibits A and B) are executed and acknowledged by all parties hereto.

IN WITNESS WHEREOF, the parties have hereunto set their hands the day and year hereinafter indicated, to this Agreement number 1 of five (5) duplicate originals.

WINFORD KENT BISHOP
"PARTY OF THE FIRST PART"

STATE OF GEORGIA)
) ss.
COUNTY OF FULTON)

Before me, the undersigned Notary Public in and for Fulton County, Georgia, on this 27th day of December, 1982, did appear Winford Kent Bishop, known to me and who executed this document before me and stated he did so as his own free act and deed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal the day and year first above written.

/s/ Claire M. Carroll
NOTARY PUBLIC

Notary Public, Georgia, State at Large
My Commission Expires: April 20, 1985

INTERNATIONAL PAPER COMPANY

By D. I. J. Wang
"PARTY OF THE SECOND PART"

STATE OF NEW YORK)
) ss.
COUNTY OF NEW YORK)

On this 1st day of November, 1982, before me appeared David I.J. Wang, to me personally known, who being by me duly sworn did say that he is the senior vice-president of International Paper Company, and acknowledged the execution of said instrument to be the free act and deed of said corporation.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal at my office in said County and State the day and year first above written.

/s/ Sherry Weinberg
NOTARY PUBLIC

My Commission Expires: March 30, 19--

CHARLES MYNEDER
"PARTY OF THE SECOND PART"

STATE OF NEW YORK)
) ss.
COUNTY OF NEW YORK)

Before me, the undersigned Notary Public in and for New York County, New York, on this 1st day of November, 1982, did appear Charles Myneder, known to me and who executed this document before me and stated he did so as his own free act and deed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal the day and year first above written.

/s/ Sherry Weinberg
NOTARY PUBLIC

My Commission Expires: March 30, 19--

BEN R. SWANK, JR.
"PARTY OF THE SECOND PART"

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

Before me, the undersigned Notary Public in and for Jackson County, Missouri, on this 26th day of October, 1982, did appear Ben R. Swank, Jr., known to me and who executed this document before me and stated he did so as his own free act and deed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal the day and year first above written.

/s/ James H. Bernard, Jr.
NOTARY PUBLIC

My Commission Expires: May 9, 1986

JEFFREY M. SMITH
"PARTY OF THE SECOND PART"

STATE OF GEORGIA)
) ss.
COUNTY OF FULTON)

Before me, the undersigned Notary Public in and for Fulton County, Georgia, on this 9th day of November, 1982, did appear Jeffrey M. Smith, known to me and who executed this document before me and stated he did so as his own free act and deed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal the day and year first above written.

/s/ Kathleen A. Fisher
NOTARY PUBLIC

My Commission Expires: January 24, 1986